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**University of Sussex**

**Department of Law, Politics and Sociology**

**Thesis Submitted for the Degree of PhD**

**The Review of the Law on Abuse of a Dominant Position  
through Soft Law in the European Union and Turkey:  
The Commission's Guidance on Article 102 TFEU and  
Implications for the Guidelines on Art.6 in Turkey**

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**June 2015**

## DECLARATION

I hereby declare that this thesis has not been, and will not be, submitted in whole or in part to another University for the award of any other degree.

.....

Ahmet Fatih ÖZKAN

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## TABLE OF CONTENTS

<b>ABSTRACT .....</b>	<b>VIII</b>
<b>TABLE OF CASES.....</b>	<b>IX</b>
<b>ABBREVIATIONS .....</b>	<b>XVII</b>
<b>INTRODUCTION TO THE THESIS .....</b>	<b>1</b>
<b>I. Background .....</b>	<b>1</b>
<b>II. Research Approach, Research Questions and Limitations .....</b>	<b>7</b>
<b>III. Contribution to the Literature .....</b>	<b>10</b>
<b>IV. Methodology .....</b>	<b>13</b>
<b>V. Thesis Structure .....</b>	<b>14</b>
<b>PART I</b>	
<b>CHAPTER 1 – THE MODERNISATION OF ART.102</b>	
<b>Introduction .....</b>	<b>18</b>
<b>1.1. The Analytical and Theoretical Framework of Art.102 .....</b>	<b>19</b>
<b>1.1.1. Introduction to Art.102 .....</b>	<b>19</b>
<b>1.1.2. Art.102 and the Economic Freedom Objective.....</b>	<b>22</b>
<b>1.1.3. Art.102 in the Case Law .....</b>	<b>26</b>
<b>1.2. The Modernisation of Art.102 .....</b>	<b>33</b>
<b>1.2.1. Background to the Modernisation of Art.102 .....</b>	<b>33</b>
<b>1.2.2. Art.102 and Formalism .....</b>	<b>37</b>
<b>1.2.3. Consumer Welfare as a New Objective for Art.102 .....</b>	<b>42</b>
<b>1.3. Stages of the Modernisation of Art.102 .....</b>	<b>44</b>
<b>1.3.1. The Modernisation at a Glance .....</b>	<b>44</b>
<b>1.3.2. Report by the EAGCP: An Economic Approach to Art.82 EC .....</b>	<b>47</b>
<b>1.3.3. Discussion Paper on the Application of Art.82 EC to Exclusionary Abuses .....</b>	<b>50</b>
<b>Conclusion.....</b>	<b>53</b>
<b>CHAPTER 2 – THE EFFECT OF THE MODERNISATION PROCESS ON THE COMMISSION’S APPROACH TO ART.102</b>	
<b>Introduction .....</b>	<b>55</b>
<b>2.1. From Special Responsibility of Dominant Firms to Efficiency .....</b>	<b>56</b>

2.1.1. The Origin of Special Responsibility.....	56
2.1.2. Competition as a Process vs. Competition as an Outcome .....	60
2.1.3. The Way to the Concept of Efficiency .....	64
<b>2.2. From a Form-based Approach to an Effects-based Approach .....</b>	<b>67</b>
2.2.1. The Form-based Approach: A Doctrine that Has Been Much Relied Upon .....	67
2.2.2. The Effects-based Approach: A Better but Complex Assessment .....	71
2.2.3. The Increasing Use of Economics in Assessing Abuse of a Dominant Position...	74
<b>2.3. From Harm to Competitors to Consumer Harm.....</b>	<b>78</b>
2.3.1. The Standard of Harm under Art.102 .....	78
2.3.2. The Harm to Competition vs. Harm to Competitors Dilemma.....	81
2.3.3. The Growing Concern for Consumer Harm .....	83
<b>Conclusion.....</b>	<b>86</b>

## **CHAPTER 3 – GUIDANCE ON THE COMMISSION’S ENFORCEMENT PRIORITIES IN APPLYING ART.102**

<b>Introduction .....</b>	<b>87</b>
<b>3.1. The Purpose and the Legal Regime of the Guidance .....</b>	<b>88</b>
3.1.1. Guidance on Enforcement Priorities Rather than “Guidelines on Art.102” .....	88
3.1.2. Commentators’ Responses to the Guidance .....	94
<b>3.2. Contributions of the Guidance to the Enforcement of Art.102.....</b>	<b>99</b>
3.2.1. Anti-competitive Foreclosure .....	99
3.2.2. The “As Efficient Competitor” Test .....	102
3.2.3. Efficiency Defence.....	105
3.2.4. Detailed Assessments on Specific Forms of Abusive Exclusionary Conduct.....	108
<b>3.3. The Enforcement of Art.102 in the Post-Guidance Period .....</b>	<b>111</b>
3.3.1. Initial Expectations from the Post-Guidance Period.....	111
3.3.2. The Judgments of the EU Courts in the Post-Guidance Period .....	114
3.3.3. The Role of the Commission in the Post-Guidance Period .....	119
3.3.3.1. Art.9 Regulation 1/2003 Decisions.....	119
3.3.3.2. Art.7 Regulation 1/2003 Decisions.....	128
3.3.3.3. Rejection of Complaints and Case Closures.....	131
<b>Conclusion.....</b>	<b>135</b>

## **PART II**

## **CHAPTER 4 – ADOPTING GUIDELINES IN RELATION TO ART.6: THEORY AND PRACTICE**

<b>Introduction .....</b>	<b>136</b>
<b>4.1. Guidelines as Soft Law Instruments: The Functions of Guidelines.....</b>	<b>137</b>
4.1.1. Providing Transparency and Predictability.....	137

4.1.2. Increasing Legal Certainty and Ensuring Compliance .....	139
4.1.3. Shaping the Law .....	140
4.1.4. Guidelines in the Example of Turkey .....	141
<b>4.2. The Impact of Turkey's Commitments to the EU on Adopting Guidelines in Relation to Art.6.....</b>	<b>144</b>
4.2.1. Accession of Turkey to the EU and Competition Law as a Negotiation Chapter.....	144
4.2.2. Reforms in the Accession Process: Implications from Turkey's Previous Adoption of EU Block Exemption Regulations and Guidelines.....	146
4.2.3. The Transposition of the Guidance vis-à-vis Turkey's Duty of Harmonisation with the EU <i>Acquis</i> .....	148
<b>4.3. Guidelines in Relation to Art.6 in Practice.....</b>	<b>151</b>
4.3.1. Observations of the Internal Staff of the TCA.....	151
4.3.2. Observations of Lawyers .....	156
4.3.3. Observations of Judges .....	159
4.3.4. Observations of Academics .....	161
4.3.5. Summary .....	162
<b>Conclusion.....</b>	<b>165</b>

## **CHAPTER 5 – THE GUIDELINES ON ART.6 VIS-À-VIS THE NATIONAL EXPERIENCE OF TURKEY WITH ART.6**

<b>Introduction.....</b>	<b>166</b>
<b>5.1. Comparative Analysis of the Guidelines on Art.6 with the Established Case Law on Art.6 in the Light of the Contributions of the Guidance .....</b>	<b>168</b>
5.1.1. The Guidelines on Art.6 at a Glance.....	168
5.1.2. The Consumer Welfare Objective in the Enforcement of Art.6 .....	169
5.1.3. The Role of Effects-based Assessments in Art.6 Cases .....	170
5.1.4. Art.6 and Anti-competitive Foreclosure .....	172
5.1.5. Art.6 and the “As Efficient Competitor” Test .....	174
5.1.6. Art.6 and Efficiency Defence .....	175
5.1.7. Specific Forms of Abusive Exclusionary Conduct in the Guidelines on Art.6 ...	177
5.1.7.1. Refusal to Deal.....	178
5.1.7.2. Predatory Pricing .....	180
5.1.7.3. Margin Squeeze .....	181
5.1.7.4. Exclusivity .....	183
5.1.7.5. Rebates.....	184
5.1.7.6. Tying.....	186
<b>5.2. Historical and Current Issues in the Enforcement of Art.6.....</b>	<b>187</b>
5.2.1. The Scope and Limitations of the Guidelines on Art.6 .....	187
5.2.2. Exclusion of the Needs of Turkey from the Scope of Guidelines on Art.6 .....	190
5.2.3. Problematic Areas in Practice: Observations of the Interviewees .....	193

## VII

<b>5.3. The Future of the Guidelines on Art.6.....</b>	<b>196</b>
<b>5.3.1. Will the TCA Abide by Its Own Guidelines?.....</b>	<b>196</b>
<b>5.3.2. What Will be the Reaction of the Appellate Courts?.....</b>	<b>198</b>
<b>5.3.3. Will the Guidelines on Art.6 Be in General Beneficial for Turkey? .....</b>	<b>201</b>
<b>Conclusion.....</b>	<b>203</b>
<b>THESIS CONCLUSION .....</b>	<b>205</b>
<b>BIBLIOGRAPHY .....</b>	<b>215</b>
<b>ANNEX I – REFLECTIONS ON RESEARCH INTERVIEWS .....</b>	<b>231</b>
<b>ANNEX II – GUIDELINES ON THE ASSESSMENT OF ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS .....</b>	<b>243</b>



**ABSTRACT**

Issuing soft law instruments on the enforcement of abuse of a dominant position in different competition law systems has never been a global trend in the last decade than before. In the European Union (EU), the European Commission published the “Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings” (the Guidance) in February 2009 as yet the final formal stage during the “modernisation” of Art.102 TFEU. As an official candidate for EU membership, Turkey is unlikely to distance itself from the developments in the EU. Within this context, “Guidelines on the Assessment of Abusive Exclusionary Conduct by Dominant Undertakings” (the Guidelines on Art.6) were published on April 7, 2014. Evident from their structure and substantive content, the Guidelines on Art.6 are closely modelled on the Guidance. Although the transposition of the Guidance into Turkish competition law seems *prima facie* desirable in terms of the harmonisation of Turkey’s domestic competition law with the EU *acquis*, the question as to whether the Guidelines on Art.6 have suited to Turkey’s own needs gains significance. Despite being the first secondary legislation on Art.6 of the Act on the Protection of Competition 1994 in Turkey, a lack of much-needed guidance on the problematic areas in the enforcement of Art.6 may well result in the Guidelines on Art.6 being a missed opportunity to establish a coherent policy on Art.6. This thesis explores whether there is a need for adopting Guidelines in relation to Art.6 in Turkish competition law, examines whether the Guidance can or should be used as a model, and finally gives reflections on how the legal regime and content of these Guidelines can be best tailored to the enforcement of Art.6 in Turkey.

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*TÜVTÜRK*, Decision no: 09-58/1405-367, dated: 09/12/2009

*UN RO-RO*, Decision no: 12-47/1413-474, dated: 01/10/2012

*Zincir Süpermarketler*, Decision no: 09-35/891-214, dated: 06/08/2009

### **Ankara Administrative Court Judgments**

Ankara Administrative Court, 11<sup>th</sup> Chamber, Decision no: E.2012/1727, K.2013/1083, dated: 11/07/2013



**The Council of State Judgments**

The Council of State, 13<sup>th</sup> Chamber, Decision no: E.2006/2308, K.2008/3417, dated: 31/03/2008

The Council of State, 13<sup>th</sup> Chamber, Decision no: E.2007/13574, K.2011/486, dated: 07/02/2011

The Council of State, 13<sup>th</sup> Chamber, Decision no: E.2008/8249, K.2011/1525, dated: 12/04/2011

**US Court of Appeals Judgments**

*Ball Memorial Hospital, Inc. v Mutual Hospital Insurance, Inc.*, 784 F.2d 1325 (7th Cir. 1986)

*Brunswick Corp. v Riegel Textile Corp.*, 752 F.2d 261 (7th Cir. 1984)

*Mr. Furniture Warehouse, Inc. v Barclays American/Commercial Inc.*, 919 F.2d 1517 (11<sup>th</sup> Cir. 1990)

*Town of Concord v Boston Edison Co.*, 915 F.2d 17 (1<sup>st</sup> Cir. 1990)

*United States v Microsoft Corp.*, 253 F.3d 34, 346 (D.C. Cir. 2001)

**US Supreme Court Judgments**

*Aspen Skiing Co. v Aspen Highlands Skiing Corp.*, 472 US 585 (1985)

*Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209 (1993)

*Brown Shoe Co. v United States*, 370 US 294 (1962)

**ABBREVIATIONS**

AG	Advocate General
CJEU	Court of Justice of the European Union
DG Comp	Directorate-General for Competition
EAGCP	Economic Advisory Group on Competition Policy
EC	European Community
EEC	European Economic Community
EU	European Union
EUMR	European Union Merger Regulation
GCEU	The General Court of the European Union
ICN	International Competition Network
MS	Member State of the European Union
NC	National Court
NCA	National Competition Authority
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the EU
TCA	The Turkish Competition Authority
TEU	The Treaty on European Union
TFEU	The Treaty on the Functioning of the European Union
UK	United Kingdom
US	United States of America

## INTRODUCTION TO THE THESIS

### I. Background

Issuing soft law instruments on the enforcement of the legal concept of prohibition of “abuse of a dominant position” in different competition law systems has never been a global trend in the last decade than before. Notwithstanding the difference in terminology, be it “abuse of a dominant position” in European Union (EU) and Turkish competition laws,<sup>1</sup> “monopolization” and “attempts to monopolize” in United States (US) antitrust law,<sup>2</sup> “misuse of market power” in Australian competition law<sup>3</sup> and “taking advantage of market power” in New Zealand competition law;<sup>4</sup> a general discussion about the appropriate treatment of abuse of a dominant position has been taking place within the last few years, especially in Europe, in the US and even at the level of international organisations such as the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD).<sup>5</sup> As an outcome of these world-wide discussions, a significant number of formal and informal materials have been released for public consultation and eventually published.

The first piece of general and non-sector-specific soft law material, “*Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)*”, was published in July 2001 by the Competition Bureau of Canada.<sup>6</sup> In December 2004, the Office of Fair Trading (now the Competition and Markets Authority) in the United Kingdom (UK) published two set of Guidelines as “*Abuse of a Dominant Position (OFT402)*” and “*Assessment of Market Power (OFT425)*” explaining how it will operate its

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<sup>1</sup> Article 102 of the Treaty on the Functioning of the European Union (TFEU) (Art.102) in EU competition law and Article 6 of the Act on the Protection of Competition 1994 (Art.6) in Turkish competition law both render it illegal abuse of a dominant position.

<sup>2</sup> Section 2 of the Sherman Act 1890.

<sup>3</sup> Section 46 of the Competition and Consumer Act 2010.

<sup>4</sup> Section 36 of the Commerce Act 1986.

<sup>5</sup> The ICN published a vast amount of reports on the appropriate treatment of specific types of unilateral conduct in the last decade and is currently preparing a complete “*Unilateral Conduct Workbook*”. For a complete list of those reports, see <<http://www.internationalcompetitionnetwork.org/>> [accessed 30/09/2014]. See also OECD (2005) Competition on the Merits, OECD Policy Roundtables, DAF/COMP(2005)27, <<http://www.oecd.org/dataoecd/7/13/35911017.pdf>> [accessed 30/09/2014].

<sup>6</sup> A newer and updated version of these Guidelines went into force in September 2012 replacing its predecessor. Available at <[http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-e.pdf/\\$FILE/cb-abuse-of-dominance-provisions-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-abuse-of-dominance-provisions-e.pdf/$FILE/cb-abuse-of-dominance-provisions-e.pdf)> [accessed 30/09/2014].

powers under the relevant competition law legislation in assessing the conduct of dominant undertakings.<sup>7</sup> In September 2008, the US Department of Justice issued “*Competition and Monopoly: Single-firm Conduct under Section 2 of the Sherman Act*” reflecting its enforcement policy in respect of monopolization cases.<sup>8</sup> In October 2009, the Japan Fair Trade Commission published “*the Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act*” describing its investigation policies in cases concerning “exclusionary private monopolization”.<sup>9</sup>

The last decade also witnessed formal documents on the prohibition of abuse of a dominant position at the EU level as well. “*Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*” (the Guidance) was announced in December 2008 and published in the Official Journal of the EU (OJ) by the European Commission (the Commission) in February 2009.<sup>10</sup> Unlike the abovementioned Guidelines in other competition law systems, in the EU the Guidance has a relatively long history and a unique motive.<sup>11</sup> In fact, the Guidance does not exist in vacuum; so far it is the final stage in the “modernisation” of Art.102. In other words, the Commission’s years of efforts to modernise the way it enforces Art.102 culminated into the publication of the Guidance. It follows that rather than standing out as a “stand-alone” document, the Guidance situates within the broader framework of the modernisation of Art.102.

Following the modernisation of Art.101 TFEU and merger control as the two other pillars of EU competition law, the modernisation of Art.102 was initiated by the Commission in the summer of 2003. The review of Art.102 started within the Directorate-General for Competition (DG Comp) and after some internal debate, members of the

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<sup>7</sup> Available respectively at <[http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft402.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft402.pdf)> and <[http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/ca98\\_guidelines/oft415.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft415.pdf)> [accessed 30/09/2014].

<sup>8</sup> Available at <<http://www.justice.gov/atr/public/reports/236681.pdf>> [accessed 30/09/2014]. However, these Guidelines were withdrawn less than a year later in May 2009. See “Justice Department Withdraws Report on Antitrust Monopoly Law”, available at <[http://www.justice.gov/atr/public/press\\_releases/2009/245710.htm](http://www.justice.gov/atr/public/press_releases/2009/245710.htm)> [accessed 30/09/2014].

<sup>9</sup> Available at <[http://www.jftc.go.jp/en/legislation\\_gls/imonopoly\\_guidelines.files/guidelines\\_exclusionary.pdf](http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/guidelines_exclusionary.pdf)> [accessed 30/09/2014].

<sup>10</sup> Communication from the Commission: Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7.

<sup>11</sup> See Chapter 1.

competition authorities of the Member States (MS) were invited to join the discussions. The first piece of informal work which was shared with public in July 2005 was the report entitled “*An economic approach to Article 82*” prepared by the Economic Advisory Group on Competition Policy (the EAGCP Report) within the Commission.<sup>12</sup> The modernisation efforts provided its first substantive product with the release of the “*Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*” (the Discussion Paper) in December 2005.<sup>13</sup> The Discussion Paper sets out ‘principles for the Commission’s application’ of Art.102 and presents ‘the analytical framework that could be used by the Commission’.<sup>14</sup>

After years of extensive review and consultation process among leading academics, legal scholars, practitioners, and representatives of the business community; the Commission finally published the Guidance in December 2008 as the next (and yet the final formal) stage in the modernisation of Art.102. The Guidance sets out ‘the enforcement priorities that will guide the Commission’s action’ in applying Art.102. It is intended ‘to provide greater clarity and predictability as regards the general framework of analysis which the Commission employs’ and ‘to help undertakings better assess whether certain behaviour is likely to result in intervention by the Commission’ under Art.102.<sup>15</sup> It is noteworthy that after almost fifty years of enforcement, the Commission has issued a formal document articulating some general and non-sector-specific statements on Art.102 for the first time.<sup>16</sup> The Guidance is primarily related to the Commission’s own enforcement and thus not legally binding on the MSs.

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<sup>12</sup> Report by the EAGCP: *An economic approach to Article 82*, July 2005, available at <[http://ec.europa.eu/dgs/competition/economist/eagcp\\_july\\_21\\_05.pdf](http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf)> [accessed 30/09/2014].

<sup>13</sup> Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, Brussels December 2005, available at <<http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>> [accessed 30/09/2014].

<sup>14</sup> *ibid* at paras.1-2.

<sup>15</sup> Guidance, para.2.

<sup>16</sup> It should be noted that despite having minor importance, some guidance on the enforcement of Art.102 in the form of soft law was available even before the modernisation. See Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services [1998] OJ C39/2, Notice on the application of the competition rules to access agreements in the telecommunications sector [1998] OJ C265/02 and Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81.

While Turkey is not a member of the EU yet, as an official candidate for EU membership, the country is unlikely to distance itself from the developments in the EU, in this respect EU competition law. In the accession process, Turkey has long aligned its competition legislation with the EU *acquis* with the passage of the Act on the Protection of Competition 1994 (the Act).<sup>17</sup> Being a milestone in Turkish competition law, the Act is the first piece of legislation governing competition law in Turkey. The provisions of this Act closely mirror the articles related to “rules of competition” in the TFEU<sup>18</sup> and the EUMR. Within this context, Art.6 of the Act governs the prohibition of abuse of a dominant position and is the national equivalent of Art.102. Art.6 follows a similar pattern with Art.102 in that both Articles first lay down a general prohibition of abuse of a dominant position and then enumerate some non-exhaustive examples through their subparagraphs. Pursuant to Art.6:

“Any abuse by one or more undertakings of a dominant position, acting individually or by means of agreements with others or collective practices, in a market for goods or services within the whole territory of the country or in a substantial part of it shall be unlawful and prohibited.

Abusive practices are, in particular, as follows:

- (a) directly or indirectly preventing the entry of a potential undertaking to the market, or practices which aim to impede the activities of competitors in the market;
- (b) applying dissimilar conditions to equivalent or to the same rights and obligations, thereby making a direct or indirect discrimination amongst equivalent trading parties;
- (c) making the conclusion of contracts subject to the acceptance of other goods or services or to the acceptance of restrictions concerning resale conditions, such as the display of other goods or services or the maintenance of a minimum resale price, by intermediary purchasers;
- (d) practices which aim to distort competition in a market for goods or services by making use of the financial, technological and commercial advantages obtained through a dominant position in another market;
- (e) limiting production, marketing or technical development to the prejudice of consumers.”

Although the concept of abuse of a dominant position lies at the heart of both Art.6 and Art.102, a definition for this concept is not provided in any of these Articles. Apart from some non-exhaustive examples in their subparagraphs, the exact scope of these Articles is not fully clear. For instance neither of them articulates the objective(s) pursued by such prohibition, in particular who or what is harmed from an abuse or whose benefits are protected. Little understanding can thus be gleaned from the texts of Art.6 and Art.102. This necessitates the issue of some guidance and guiding principles as to how the

<sup>17</sup> Published in Official Gazette No: 22140, dated: 13/12/1994. An unofficial English translation is available at <<http://www.rekabet.gov.tr/en-US/Pages/Act-No-4054>> [accessed 30/09/2014].

<sup>18</sup> Title VII, Chapter 1, Section 1 of the TFEU contains the “rules on competition” throughout Arts.101-109.

prohibition laid down in these Articles would be enforced. In most cases, such guidance is made available through non-binding soft law instruments, usually in the form of “Guidelines”. The value of Guidelines, especially for undertakings who wish to observe the law, can be appreciated since the language of competition law in most jurisdictions is general and the provisions of the law are usually not sufficiently detailed to offer appropriate guidance.<sup>19</sup> It has been argued that Guidelines have become ‘a far more significant part of the antitrust legal development process than their technical status as mere nonbinding guides for agency prosecutorial discretion would suggest’.<sup>20</sup>

When this thesis first started, Turkey had no secondary legislation on Art.6. A commission was set up within the Turkish Competition Authority (the TCA) in the second half of 2012 with the aim of preparing some form of guidance on Art.6. The commission began by reviewing the state of case law on Art.6 (which predominantly includes the decisions of the TCA since the driving force for competition law in Turkey is the TCA rather than the Turkish Appellate Courts), the existing literature in Turkish competition law and the developments in other competition law systems in the area of abuse of a dominant position. Being the first substantive product of the commission, “*the draft Guidelines on the Assessment of Conduct by Dominant Undertakings*” were shared with the internal staff of the TCA and received feedback. Taking all the feedback into account, the second draft was presented to the members of the Board of the TCA. The third draft was finally shared with public: On July 18, 2013, the TCA released for public consultation “*the draft Guidelines on the Assessment of Abusive Exclusionary Conduct by Dominant Undertakings*”.<sup>21</sup> All interested parties were invited to make their comments until September 8, 2013. Finally, the TCA published in its website the “*Guidelines on the Assessment of Abusive Exclusionary*

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<sup>19</sup> Dabbah, M. M. (2010) *International and Comparative Competition Law*, CUP, Great Britain, p.69.

<sup>20</sup> Greene, H. (2006) ‘Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse’, *William and Mary Law Review*, 48(3), p.777.

<sup>21</sup> Available in Turkish at <<http://www.rekabet.gov.tr/tr-TR/Guncel/Hkim-Durumdaki-Tesebbuslerin-Dislayici-Kotuye-Kullanma-Niteligindeki-Davranislarinin-Degerlendirilmesine-Iliskin-Kilavuz-Taslagi-kamuoyu-gorusune-acildi>> [accessed 30/09/2014].

*Conduct by Dominant Undertakings*” (the Guidelines on Art.6) on April 7, 2014, which went into force on the date of publication.<sup>22</sup>

It can be observed that the TCA has opted for the adoption of the Guidance rather than drafting its own Guidelines which could have reflected its own experience with Art.6. Even a cursory analysis of the Guidelines on Art.6 shows that they mirror the Guidance in terms of both structure and substantive content.<sup>23</sup> Theoretically, it can be assumed that the concerns expressed and problems experienced in the enforcement of Art.102 before the modernisation<sup>24</sup> might be the same for Art.6 as Art.6 borrowed extensively from Art.102. On the other hand, the application of Art.6 may have evolved in a different direction than that of Art.102 or may merely be at a different stage of evolution. The reasons behind the modernisation of Art.102 may not be an issue in Turkey and the motivations for Turkey may be far more different. After all; economic development, and political and social circumstances of Turkey may differ from the EU, especially in an area as complex as abuse of a dominant position. In contrast to the TCA, it is almost inevitable that the Commission is subject to a great deal of pressure to remove policy-making inconsistencies as well as to clarify legal principles and the economic basis of its decisions, due to the continent-wide territorial scope of its jurisdiction and the economic and legal relevance of the cases brought before it.<sup>25</sup>

Alternatively there may be some aspects in Turkish practice which may already overlap with, or may even be more advanced than, the Commission’s new reading of Art.102 with the Guidance, so that there may not be a need for adopting Guidelines in the first place. As discussed above, in the absence of a definition which successfully embraces all abusive behaviour that fall into the scope of the prohibition laid down in Art.6, it is desirable to identify some guiding principles that would inform the content of the Article. In this respect, as non-binding soft law instruments, Guidelines are good means of

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<sup>22</sup> Available in Turkish at <<http://www.rekabet.gov.tr/tr-TR/Guncel/Hakim-Durumdaki-Tesebbuslerin-Dislayici-Kotuye-Kullanma-Niteligindeki-Davranislarinin-Degerlendirilmesine-Iliskin-Kilavuz-Yayimlandi>> [accessed 30/09/2014]. See Annex II for an unofficial English translation of the Guidelines on Art.6.

<sup>23</sup> See Chapter 5.

<sup>24</sup> See Chapter 2.

<sup>25</sup> Blanco, L. O. and Colomo, P. I. (2011) “Evolving Priorities and Rising Standards: Spanish Law on Abuse of Market Power in the Light of the 2008 Guidance Paper on Article 82 EC”, in Pace L. F. (ed.), *European Competition Law: The Impact of the Commission’s Guidance on Article 102*, Edward Elgar Publishing, Great Britain, p.99.



providing guidance on areas which are in need of clarification. However, competition authorities must think twice before issuing any set of Guidelines. This is because Guidelines lead to a limited discretion for competition authorities and create legitimate expectations for undertakings as their addressees.<sup>26</sup> Departures from Guidelines, where not justified with convincing evidence, may make the enforcement less predictable and lead to an unnecessary confusion in the business world. Competition authorities' failure to comply with their own Guidelines may result in an even worse situation in that undertakings may face with a dilemma about abiding by the Guidelines or obeying the statutory or case law instead.

Furthermore, the accession of Turkey to the EU may have a bearing on the transposition of the Guidance into Turkish competition law. The duty of Turkey to harmonise its domestic law with the EU *acquis*, which includes *inter alia* complying with EU block exemption Regulations, Frameworks and Guidelines, may obligate Turkey to adapt the Guidance as Guidelines in relation to Art.6 and align its enforcement of Art.6 with the Commission's new reading of Art.102. On the other hand, Turkey may not be under an obligation to adapt the Guidance, considering the fact that the Guidance is not a statement of law and only sets out some principles of the administrative practice of the Commission.<sup>27</sup> In any case, the transposition of the Guidance does not necessarily prevent the needs of Turkey being included into the scope of Guidelines in relation to Art.6. In the event that they do not offer adequate guidance on the problematic areas in the enforcement of Art.6, Guidelines in relation to Art.6 may well be a missed opportunity to establish a coherent policy on abuse of a dominant position in Turkey. All in all, adoption of Guidelines in relation to Art.6 requires an inquisitive approach, one that considers all of those aspects and takes no argument for granted. A comprehensive research in this area is therefore highly relevant and needed.

## **II. Research Approach, Research Questions and Limitations**

It is against this background that this thesis thoroughly explores whether there is a need for adopting Guidelines in relation to Art.6 in Turkish competition law, examines whether the

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<sup>26</sup> See Chapter 4.

<sup>27</sup> See Chapter 3.

Commission's Guidance as the main outcome of the modernisation of Art.102 in EU competition law can be or, considering the duty of Turkey to harmonise its domestic competition law with the EU *acquis* under the accession regime, should be used as a model or a benchmark, and finally gives reflections on how the legal regime and substantive content of Guidelines in relation to Art.6 can be best tailored to the enforcement of Art.6 by the TCA and the Turkish Appellate Courts.

It follows that the thesis provides answers to the following two main research questions:

- Is there a need for adopting Guidelines in relation to Art.6 in Turkish competition law? If the answer is in the affirmative, can or should the Guidance be used as a model?
- In the event that the Guidance does not suit to the needs of Turkey, how can such Guidelines be best tailored to reflect the country's experience with Art.6?

A comparative approach into the research subject is employed in this thesis which aims to make comparisons between the EU experience with the Guidance at the Union level and the Turkish experience at the domestic level with the prohibition of abuse of a dominant position. The thesis draws on the EU experience by using it as background and context against which it measures Turkish experience and derives significant conclusions. The reason for the choice of this approach is the "close links" between Turkey and the EU in that Turkey is an official candidate country for EU membership, and developments in the EU *acquis* are unlikely to have no bearing on the current state of statutory law and case law in Turkey. Compared to the American experience or the experience of any other country with Guidelines or other soft law instruments in this area of competition law, the EU experience is directly relevant for Turkey's national law and has therefore a strong influence on the direction of both statutory law and case law in Turkey.

The thesis takes the view that understanding the Guidance lies beneath understanding *a priori* the modernisation of Art.102. This includes as to why Art.102 was subject to a modernisation process in the first place, why the Commission felt the need (or was called upon) to modernise the way it had enforced Art.102, how that modernisation has

progressed over time, whether the process was straight-forward or the Commission faced any problem, what changes have occurred in the Commission's approach towards the interpretation of abuse of a dominant position, what the Guidance has brought to the enforcement of Art.102 that could be regarded as "novel", and how that enforcement has progressed after the Guidance. Because the Guidelines on Art.6 are modelled on the Guidance, a thorough discussion of the Guidance and the underlying modernisation is therefore deemed as essential for a better understanding of the Guidelines on Art.6.

The thesis therefore examines the abovementioned main research questions by also exploring the following sub-questions:

- Why was Art.102 subject to a modernisation process? How has the modernisation of Art.102 progressed? (Chapter 1)
- What changes have occurred in the Commission's approach towards the interpretation of abuse of a dominant position with the modernisation of Art.102? (Chapter 2)
- What has the Guidance brought to the enforcement of Art.102? How has the enforcement of Art.102 moved forward since the publication of the Guidance in 2009? (Chapter 3)
- What are the likely benefits and costs of adopting Guidelines in relation to Art.6? What is the impact of Turkey's duty to harmonise with the EU *acquis* on the adoption of the Guidance as Guidelines in relation to Art.6? What are the opinions of the internal staff of the TCA, lawyers, judges and academics in Turkey on the adoption of Guidelines in relation to Art.6? (Chapter 4)
- What have the Guidelines on Art.6 brought to the enforcement of Art.6 and to what extent, are they in harmony with the established case law? Are there any historical and/or current issues on Art.6 that should have been addressed in the Guidelines on Art.6? What will be the future of the Guidelines on Art.6? (Chapter 5)

As for the research limitations, the thesis only deals with substantial competition law thinking on abuse of a dominant position, rather than procedure. There is no discussion of the modernisation of EU competition law with respect to reforms in the institutional functioning of the enforcement or of the decentralisation of powers between the

Commission and the MSs. This discussion is deemed as irrelevant since Turkey has not yet become part of the institutional structure of the EU and is not subject to the relevant regulatory framework yet.

Furthermore, the thesis attaches more weight to the abuse element of both Art.102 and Art.6 which stands out as the most controversial part of both of those Articles, in contrast to the jurisdictional element and the dominant position element. In this respect, the abuse element appears to be in more need of guidance. The other elements are discussed in a few parts of the thesis where specific references are made thereto.

The thesis is up to date as September 30, 2014.

### **III. Contribution to the Literature**

The contribution of the thesis to the existing research literature on Art.102 TFEU and its application in Turkey is two-fold: First, it contributes to the literature on EU competition law by shedding light on the enforcement of Art.102 in the post-Guidance period. This thesis is timely in that it enjoys the advantage of articulating what has *actually* happened after the official issue of the Guidance in early 2009, rather than to merely *speculate* on the future of the Guidance. It analyses the developments after the Guidance, such as the prohibition, commitment and rejection decisions of the Commission, as well as the judgments of the General Court (GCEU) and Court of Justice of the EU (CJEU) (the EU Courts) with a view to deriving conclusions on how the enforcement of Art.102 has been shaped after 2009. It explores whether the Commission has stuck to the principles in the Guidance, whether the assessments of the Commission in its post-Guidance decisions are in line with its “enforcement priorities”, what types of abuses have been taken up by the Commission, how the allegations of abuse have appeared and finally how the EU Courts have reacted to the Commission’s new reading of Art.102. Much has been written in EU competition law literature on Art.102 and on the modernisation of Art.102, but little has been said in scholarly works with respect to the evaluation of the Commission’s practice in the post-Guidance period as a whole and its impact on the modernisation of Art.102.

Analyses of decisions and investigations in the post-Guidance period have often been confined to a particular case or a group of cases that are related to the same industry or

decided in the same year. There is a growing literature on some specific highlights of this period, especially on the Commission's ongoing *Google* investigation, the implications of the *Alrosa* saga of the EU Courts for the use of commitments in Art.102 cases and the commitment decisions in the energy industry.<sup>28</sup> However, the method of inquiry in this thesis is not confined to the analysis of one particular decision or a group of decisions. Instead, the thesis aims to explore the post-Guidance period from a broader perspective: It examines the Commission's overall practice in this period, which includes Art.9 Regulation 1/2003 commitment decisions, Art.7 Regulation 1/2003 prohibition decisions, and decisions on rejection of complaints and on case closures. No single study in the literature has made such a comprehensive analysis of the Commission's enforcement practice in the post-Guidance period. At the end of the inquiry, the thesis observes that Art.9 commitments mark another, albeit informal, stage in the modernisation of Art.102, an original argument which has not been put forward in any of the scholarly works to date. It is true that Art.9 commitments have attracted attention in the literature in recent years, but the thesis approaches commitments from a different perspective: It does not argue whether commitments are an "appropriate" tool of enforcement in Art.102 cases as most commentators have done in scholarly works. Instead, it regards Art.9 commitments as a stage, albeit not necessarily positive, in the modernisation of Art.102. It is this particular view that represents the original contribution.

The main contribution of the thesis is, however, to Turkish competition law. In Turkish competition law and policy literature, this area is not properly researched and many questions are yet to be answered satisfactorily. So far only three scholarly works have voiced a need for adopting Guidelines in relation to Art.6 from different perspectives. Demiröz and Tunçel analysed whether the judgments of the Turkish Appellate Courts could guide the TCA in preparing Guidelines in the area of Art.6.<sup>29</sup> Dealing with cost benchmarks in pricing abuses, Özdemir argued that the TCA should make it clear by issuing Guidelines how it would assess pricing abuses and which cost concepts it would use in its

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<sup>28</sup> See Chapter 3.

<sup>29</sup> Demiröz, A. and Tunçel, Ç. (2011) *Tek Taraflı Davranışların Değerlendirilmesine Yönelik Standart Arayışında Danıştay Kararlarının Yol Göstericiliği, Rekabet Hukuku ile İlgili Kurul ve Yargı Kararları Sempozyumu-II*, BTHAE Publications, Ankara.

assessments.<sup>30</sup> Finally, Madan found that Guidelines on the standards or tests that the TCA explicitly or implicitly uses in its decisions when identifying abuses would be beneficial.<sup>31</sup> In addition, no scholarly work on the analysis of the Guidelines on Art.6 of 2014 was published at the time of writing, with the exception of an article published by the author of this thesis.<sup>32</sup> It follows that there is no comprehensive study on the Guidelines on Art.6 as a whole, and there is thus a gap in the literature. An analysis of this area will not be a theoretical pursuit of merely academic interest, but a matter of practical importance as it will deal with a legal instrument which is in force and expected to be applied to unilateral exclusionary conduct of dominant undertakings in Turkey. This area should be studied in that a good research in this area will ultimately increase predictability and legal certainty for businesses in the enforcement of Art.6 in Turkey by providing them a more comprehensive analysis of the Guidelines on Art.6 than their paragraphs would suggest, as well as by explaining them the gaps in these Guidelines.

This thesis is the first thorough, comparative and original research on the Guidelines on Art.6 which significantly contributes to the literature by providing a deep, critical and coherent analysis of the Guidelines on Art.6 in the light of the national experience of Turkey with Art.6 while fully taking into account the EU competition law context. Before this thesis, no scholarly work has provided a similar critique of the Guidelines on Art.6. In essence, the thesis deals with a new legislation in Turkish competition law which further demonstrates its originality. In doing so, the thesis does not briefly analyse the Guidelines on Art.6 as a mere recent development, but instead provides the abovementioned critique of the Guidelines on Art.6 at a PhD level. In addition, this thesis is also the first, and so far the only, piece of empirical research in this area which is enhanced by first-hand qualitative data obtained as a result of a series of research interviews made with some selected members of the internal staff of the TCA, lawyers, judges and academics in Turkey (see below). Lastly, as discussed above, this thesis deals with a recent research topic across

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<sup>30</sup> Özdemir, Ü. N. (2010) *Fiyatlamaya İlişkin Tek Taraflı Davranışların Değerlendirilmesinde Kullanılan Maliyet Ölçütleri*, The Turkish Competition Authority Expertise Theses Series No 96, Ankara.

<sup>31</sup> Madan, Z. (2009) *ABD ve AB Perspektifinden Dışlayıcı Uygulamaların Tespitine Yönelik Standart Tartışmaları*, The Turkish Competition Authority Expertise Theses Series No 85, Ankara.

<sup>32</sup> Özkan, A. F. (2014a) 'Hakim Durumun Kötüye Kullanılması Kılavuzu'nun Kapsamlı Bir İncelemesi', *Rekabet Forumu*, No 85, p.10-42.

different competition law systems in the world, therefore being a timely thesis also increases its capability of contributing to the literature.

#### **IV. Methodology**

In providing answers to the abovementioned main research questions, a legal approach has been adopted as the theoretical framework of the thesis. In other words, whether there is a need for Guidelines in relation to Art.6 in Turkish competition law is not examined from an economic or a political perspective. This thesis primarily focuses on legal issues in answering the abovementioned main research questions and in this respect examines, for instance, whether the reasons that paved the way for the publication of the Guidance also exist in Turkish competition law or whether there are inconsistencies in the standards and tests used by the TCA which may justify the adoption of Guidelines for transparency and legal certainty. Analysis of the markets in Turkey is not provided in this thesis; therefore, questions that are deemed as unrelated to the theoretical framework of the thesis, for instance whether there are markets where significant market power is likely or whether there are sectors susceptible to abuse of a dominant position in Turkey so that they can be given more weight or priority in Guidelines, are not addressed.

The thesis is essentially based on library-based (doctrinal) research. The main research method employed in this thesis is the examination and critical analysis of primary and secondary sources of law. In this respect, the thesis mainly explores the decisional practice of the Commission and the TCA, and the case law of the EU Courts and the Turkish Appellate Courts as primary sources of law. Scholarly works, legal journals, textbooks, case comments and so on are examined as secondary sources of law. The jurisdictional scope is limited to the EU and Turkish competition laws. It should be noted that there is a tendency in the literature to compare and contrast EU competition law with US antitrust law in the context of the modernisation of Art.102 usually in an attempt to show that the former lagged behind the latter on a given topic. This thesis also follows this trend by comparing, where necessary, the changes in the Commission's approach to Art.102 after the modernisation with the situation in the US.

A complementary methodology is empirical research. The thesis takes the view that if there is a need for something in practice, this could be best determined by gathering information through direct interaction with the relevant people or institutions. To this end, the author of this thesis undertook research interviews with (i) the internal staff of the TCA, namely competition experts, senior competition experts and other high-ranked officials within the TCA, and the Commissioners who prepared the Guidelines on Art.6, (ii) the lawyers who specialise in competition law cases in Turkey, (iii) the judges within the special chamber for competition law cases within the Council of State<sup>33</sup> and (iv) the academics who have their research interests in Art.6 or who have published widely in competition law in Turkey. Their practical experience, together with their theoretical knowledge, were deemed as insightful and helpful in answering the abovementioned main research questions. They assisted the theoretical framework of the thesis in complementing the written works with practical views from the perspective of the enforcer of Turkish competition law, the legal counsel of dominant undertakings, the judiciary and lastly the academia.<sup>34</sup>

## **V. Thesis Structure**

The thesis is divided into five chapters in two parts. Being the first chapter of Part I, Chapter 1 begins by the discussion of the modernisation of Art.102 initiated by the Commission during the last decade. It provides answers to the sub-questions as to why Art.102 was subject to a modernisation process in the first place and how that modernisation has progressed. After a brief introduction to Art.102, this Chapter discusses the reasons that paved the way for the modernisation of Art.102, carefully analyses some illustrating examples from the case law of the EU Courts and finally explains the stages of the modernisation. Chapter 1 observes that there was a need for at least guidance, if not modernisation, on the enforcement of Art.102, because of the fact that the text of the

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<sup>33</sup> In the Turkish legal system, decisions of the TCA are subject to judicial review and can be appealed to the appellate courts on both merits and law. Originally, the appellate court was the Council of State (Danıştay). In July 2012, the appellate court for the decisions of the TCA was changed to the Ankara Administrative Court. Decisions of the Ankara Administrative Court are further appealable to the Council of State. A special chamber (13<sup>th</sup> Chamber) within the Council of State performs the judicial review of the decisions of the TCA, while there is no special chamber within the Ankara Administrative Court.

<sup>34</sup> See Annex I for more information on the interviewee groups, a full list of interview questions, a summary of replies of the interviewees and the method used in the reporting and analysis of the interview data.



Article was silent on the meaning of abuse and on the objective(s) of the Article, the definition of abuse by the CJEU was unsatisfactory and provided no methodology for identifying its scope, distinguishing “competition on the merits” from abusive conduct was challenging and finally there was a lack of coherent analytical approach in the case law. Chapter 1 argues that mainly because of the old case law on Art.102 which has been criticised for being formalistic and lacking economic arguments or efficiency considerations, the Commission engaged in the modernisation of the way it enforces Art.102 with a view to bringing the Article into line with the modern economic thinking on unilateral conduct.

Chapter 2 discusses the Commission’s new reading of Art.102 with the modernisation of Art.102. It deals with the sub-question as to what changes have occurred in the Commission’s approach towards the interpretation of abuse of a dominant position with the modernisation. Built upon the findings of Chapter 1, Chapter 2 furthers the discussion and examines the situation both before the modernisation and after the modernisation in an attempt to highlight the changes in the Commission’s substantial thinking. The Chapter observes that the modernisation involved a reorientation in the Commission’s reading of Art.102 with respect to a greater recognition of efficiency, effects-based assessments and proof of consumer harm in Art.102 cases. Chapter 2 argues that with the modernisation of Art.102, which has given a fresh impetus to the use of economic analysis in the assessment of unilateral conduct, the Commission has aimed to steer the enforcement of Art.102 from a heavy reliance on the special responsibility of dominant firms towards a greater recognition of efficiency, from an approach based on the form of conduct towards an approach that is concerned with the effects of conduct, and lastly from the presence of harm to competitors to the analysis of consumer harm in Art.102 cases.

Chapter 3 is on the substantial analysis of the Guidance and the evaluation of the post-Guidance period. It is concerned with the sub-questions as to what the Guidance has brought to the enforcement of Art.102 and how that enforcement has evolved since the issue of the Guidance. This Chapter examines the purpose and legal regime of the Guidance, commentators’ criticisms that have been levelled against the Guidance and the

contributions of the Guidance to the enforcement of Art.102, as well as how that enforcement has been shaped in the post-Guidance period after 2009. It draws attention to the fact that the Guidance is not “Guidelines” from a legal point of view and determines that the Guidance has caused a great deal of controversy arising from its title to its substantive content among commentators. Chapter 3 observes that anti-competitive foreclosure, the “as efficient competitor” test, efficiency defence and detailed assessments on specific forms of abusive exclusionary conduct stand out as the most novel parts and contributions of the Guidance to the enforcement of Art.102. Chapter 3 argues that Art.9 Regulation 1/2003 commitments mark another, albeit informal, stage in the modernisation of Art.102, as the Commission’s increasing use of such commitments has outstripped many practical discussions that were expected to take place after the issue of the Guidance but instead created new problems on the appropriateness, legal review and excessive use of commitments in Art.102 cases.

Chapter 4 is the first chapter of Part II and shifts the focus of the thesis to Turkey. Taking both a theoretical and a practical approach, this Chapter aims to answer the first main research question as to whether there is a need for Guidelines in relation to Art.6 in Turkey. It begins by discussing the functions of Guidelines as soft law instruments and then draws some theoretical conclusions for Turkey on the likely benefits and costs of adopting Guidelines in relation to Art.6. Second, it deals with the impact of Turkey’s duty to harmonise its national competition law with the EU *acquis* on the adoption Guidelines in relation to Art.6. In this respect, it outlines the accession process of Turkey to the EU with a focus on competition policy as a negotiation chapter, explores the reforms made by Turkey in this process and examines whether the country is legally required to adopt the Guidance as Guidelines in relation to Art.6 as part of its duty of harmonisation. Lastly, it reports the findings of the research interviews made with different groups of interviewees with a view to demonstrating opinions from practice. Chapter 4 observes that the TCA and other State authorities in Turkey explicitly stressed the need for adopting Guidelines in relation to Art.6 through different documents. Chapter 4 argues that while the enforcers of Art.6 and the legal counsel of the undertakings as the addressees of this Article felt a need for Guidelines in their personal experience, the judges were rather reluctant to the adoption of

Guidelines in relation to Art.6 and took the view that such Guidelines would have a limited impact on the judicial review.

Chapter 5 provides answers to the second main research question as to how Guidelines in relation to Art.6 can be best tailored to reflect Turkey's experience with Art.6. First, it provides a comparative analysis of the content of the Guidelines on Art.6 with the contributions of the Guidance and the established case law on Art.6, with a view to showing to what extent the Guidelines on Art.6 reflect the experience of the country with Art.6. It then explores the most problematic historical and/or current issues on Art.6 in Turkey which should have been addressed in the Guidelines on Art.6, but were left outside their scope as a result of the adoption of the Guidance. Lastly, it speculates on the future of the Guidelines on Art.6, and explores whether the TCA will abide by its own Guidelines and how the appellate courts will react. Chapter 5 observes that the general assessments of the Guidelines on Art.6 are in line with the case law on Art.6, but the specific assessments on specific forms of exclusionary conduct largely differ from those in the case law. Chapter 5 argues that the absence of any guidance on the problematic areas that are peculiar to Turkey undermines predictability and legal certainty as aimed by the Guidelines on Art.6. Chapter 5 is followed by the Conclusion, which outlines the findings and conclusions of the thesis.

## PART I

### CHAPTER 1 – THE MODERNISATION OF ART.102

#### Introduction

Chapter 1 explores the following sub-questions: First, why was Art.102 subject to a modernisation process? Second, how has that modernisation progressed? This Chapter introduces Art.102 and the modernisation of Art.102. It takes the view that understanding the Guidance lies beneath understanding *a priori* the modernisation of Art.102, because of the fact the Guidance is the culmination of the Commission’s efforts to modernise the way it has applied Art.102. In other words, because the Guidance does not exist in vacuum, it should be interpreted within the broader framework of the underlying modernisation. For this reason, before the analysis of the Guidance itself, it is necessary to explore the modernisation of Art.102 which constitutes the background of the Guidance. The analysis of the modernisation in this Chapter centres on *why* the Article was subject to a modernisation process in the first place and *how* that modernisation has progressed until the publication of the Guidance.

Chapter 1 is divided into three sections: Section 1.1 introduces Art.102 as the subject of the modernisation and of the Guidance. This Section first discusses the analytical framework and the constituent elements of Art.102. It proceeds with a discussion of the theoretical underpinning of the Article and the predominantly pursued objective of economic freedom. Lastly, it briefly shows how the Article has been applied and how the concept of abuse of a dominant position has been interpreted by the Commission and the EU Courts. Section 1.1 observes that there was a need for at least guidance, if not modernisation, on the enforcement of Art.102, because of the fact the text of the Article was silent on the meaning of abuse and on the objective(s) of the Article, the definition of abuse by the CJEU was unsatisfactory and provided no methodology for identifying its scope, distinguishing “competition on the merits” from abusive conduct was challenging and there was a lack of coherent analytical approach to the Article in the case law.

Section 1.2 is concerned with the modernisation of Art.102. This Section first provides background to the modernisation of Art.102 by addressing the modernisation of the two other pillars of EU competition law, namely Art.101 and merger control, which preceded the modernisation of Art.102. By shedding light on some examples from the case law on Art.102, it then focuses on the reasons as to why the approach of the Commission and the EU Courts to Art.102 before the modernisation gave rise to heavy criticisms in the literature and paved the way for modernisation. Finally it explains the consumer welfare objective which has given a special consideration with the modernisation of Art.102. Section 1.2 observes that mainly because of the old case law on Art.102 which has been criticised for being formalistic and lacking economic arguments or efficiency considerations, the Commission engaged in the modernisation of Art.102 with a view to bringing the Article into line with the modern economic thinking on unilateral conduct.

Section 1.3 explains the stages of the modernisation. This Section sheds light on how the modernisation of Art.102 has progressed and analyses the earlier documents that preceded the Guidance during this process. First, it briefly explains the modernisation process from its very beginning to the publication of the Guidance. It then discusses the first piece of written work of the modernisation that was shared with public, the EAGCP's Report entitled "An economic approach to Article 82". Finally, it analyses the first substantive product of the modernisation, the Discussion Paper on the Application of Article 82 to Exclusionary Abuses. Section 1.3 observes that the modernisation of Art.102 began in 2003 and started within the DG Comp, and the earlier products of the modernisation appeared only in 2005 once the reform in the area of merger control was completed.

## **1.1. The Analytical and Theoretical Framework of Art.102**

### **1.1.1. Introduction to Art.102**

Art.102 has been a basic provision of EU competition law for more than half a century. It forms a part of the chapter in the TFEU devoted to the common rules on the EU's policy in the field of competition. Being the legal basis for a crucial component of EU competition law and policy, the provision was first laid down in the Treaty establishing the European Economic Community 1957 (the Treaty of Rome) as "Art.86 EEC". The numbering of this

Article has varied over the years as a result of different amendments to the founding Treaties of the EU. In this respect, it was renumbered as “Art.82 EC” by the Treaty on European Union 1992 (the Treaty of Maastricht) and recently, it was renumbered as “Art.102 TFEU” by the Treaty on the Functioning of the European Union 2009 (the Treaty of Lisbon).<sup>1</sup> Notwithstanding those changes in its numbering, the text of the Article has remained substantially unchanged.

Art.102 regulates the unilateral conduct of dominant undertakings. In order for Art.102 to apply, there must be an undertaking (or more than one undertaking) holding a dominant position in the Internal Market or in substantial part of it (the dominant position element), such position must be abused (the abuse element) and finally, there must be actual or potential effect on trade between MSs in a substantial part of the Internal Market (the Union dimension element). Not all undertakings are subjected to Art.102; it applies to an undertaking, or in certain cases more than one undertaking, holding a dominant position on the relevant market.<sup>2</sup> Normally, more than one national market must be affected by the abusive conduct for Art.102 to apply. The underlying elements of the Article are the dominant position element and, in particular, the abuse element which is also the most controversial part of the Article.

The list of abuses contained in the Article is not an exhaustive enumeration of the abuses prohibited by the Treaty.<sup>3</sup> The subparagraphs of Art.102 are merely illustrative and do not attempt to provide a fully defined list of all possible types of abuses. For this reason, it is irrelevant to show that alleged abuse must actually conform to one of the examples in the subparagraphs, though this could be conclusive in a case. The illustrative examples in the subparagraphs are open to interpretation and more often than not to a considerable degree of doubt.<sup>4</sup> However, it is also true that no legal rule on the prohibition of abuse of a dominant position could realistically list all possible types of abuses in an exhaustive way.

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<sup>1</sup> All references to “Art.86 EEC” and “Art.82 EC” shall be understood as references to “Art.102 TFEU” throughout this thesis.

<sup>2</sup> ‘It is in no way the purpose of Article [102] to prevent an undertaking from acquiring, on its own merits, the dominant position on a market.’ Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECR I-0000.

<sup>3</sup> Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECR 215, para.26; Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951, para.37.

<sup>4</sup> Vesterdorf, B. (2011) ‘Article 102 TFEU and Sanctions: Appropriate When?’, *European Competition Law Review*, 32(11), p.576.

Even if a rule that listed most types of abusive conduct existed, dominant undertakings would be able to devise new abusive practices.<sup>5</sup>

Little understanding can be gleaned from reading the text of Art.102 itself, since much of the Treaty's wording is open-textured.<sup>6</sup> Although the concept of abuse of a dominant position lies at the heart of Art.102, ironically a statutory definition for this concept is not provided in the Article. Art.102 offers little guidance as to *who* or *what* is harmed from an abuse, whose benefits are protected or what objectives are or can be pursued. In fact, if the Union dimension element and the dominant position element are omitted from the text, the Article will then merely state that "any abuse shall be prohibited". What is clear from the wording is perhaps the notion that a dominant position is not prohibited; only its abuse is prohibited.<sup>7</sup> It follows that even a careful and law-abiding undertaking may easily find itself in a situation in which it is not clear whether it is dominant and/or its conduct amounts to an abuse.<sup>8</sup>

It is correct to say that Art.102 is thus not drafted in clear, precise and unambiguous language.<sup>9</sup> For these reasons, the theoretical underpinning of the Article should be examined. In this respect, a broader interpretation of the ratio legis of Art.102 taking into account the theoretical foundations that paved the way for its enactment will be much more helpful compared to a narrow literal interpretation of its text. In this way, some expressions in its subparagraphs such as "unfair" and "prejudice of consumers" will be more meaningful; for example, it will make more sense as to why these expressions were not drafted by the original draftsmen as "inefficient" and "prejudice of competitors" respectively. Understanding the theoretical underpinning of Art.102 will be helpful in understanding what the Article aims to prevent and why the abuse of a dominant position is condemned by the law.

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<sup>5</sup> Temple Lang, J. (1979) 'Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law', 3 *Fordham Int'l L.J.*, p.23.

<sup>6</sup> The Treaty is drafted in broad and non-specific language, leaving it to the EU institutions and in particular the EU Courts, to put flesh on the bare bones. Whish, R. (2009) *Competition Law*, 6<sup>th</sup> Edition, OUP, Great Britain, p.191.

<sup>7</sup> The Commission and the EU Courts have long reiterated that Art.102 does not prohibit dominance itself, but only its abuse. See Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461, para.57 ('A finding that an undertaking has a dominant position is not in itself a recrimination').

<sup>8</sup> Vesterdorf (2011), p.575.

<sup>9</sup> *ibid* at p.577.

### 1.1.2. Art.102 and the Economic Freedom Objective

While it has been widely argued that Art.102 is aimed at controlling ‘the abusive exercise of market power’,<sup>10</sup> it is less clear how this would be done in practice and what legal interest that is worth protecting from being infringed. It appears that this wholly depends on the objective that is pursued by the Article. The text of Art.102 is silent on its objective(s) and does not explicitly specify any in this respect. An advantage of such drafting is that it allows flexibility in pursuing different objectives and adopting different approaches to abuse.<sup>11</sup> On the other hand, as with every legal rule, Art.102 must be clear and precise, and should not leave room for ambiguity in order for dominant undertakings to ensure that they abide by the Article and avoid large fines. However, Art.102 will be neither clear, nor particularly helpful in the absence of an objective which would elaborate the meaning of abuse.

Contrary to what one may think, Art.102 does not have a settled objective; there is in fact a feverish debate on its objective(s). As the former Competition Commissioner Kroes pointed out, some may think it somewhat surprising that after many years of enforcement, there is still a lively debate on the objectives of Art.102.<sup>12</sup> According to Faull and Nikpay, debate about Art.102 has generally centred on the purpose of the prohibition of abusive conduct as to what it is supposed to protect.<sup>13</sup> This is because, as Dabbah observes, the CJEU has created a jurisprudence which makes it difficult to figure out ‘the real aim’ of

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<sup>10</sup> Bellamy, C. and Child, G. (2008) *European Community Law of Competition*, 6<sup>th</sup> Edition, OUP, Great Britain, p.910. See also Sher, B. (2004) ‘The Last of the Steam-powered Trains: Modernising Article 82’, *European Competition Law Review*, 25(5), p.244 ([‘T]he control of market power is the most obvious goal for Art [102].’); Fox, E. M. (2003) ‘We Protect Competition, You Protect Competitors’, *World Competition*, 26(2), p.9 (‘Article [102] was intended to *regulate* the conduct of dominant firms and to prevent dominant firms from *unfairly* using their power...’) (emphasis original); and O’Donoghue, R. and Padilla, J. (2013) *The Law and Economics of Article 102 TFEU*, 2<sup>nd</sup> Edition, Hart Publishing, Great Britain (2013), p.3 (‘Article 102 seeks to avoid the use and misuse of market power...’). On the meaning of market power, see *infra* “1.1.3. Art.102 in the Case Law”.

<sup>11</sup> The language of Art.102 created ample discretion to determine its protective scope by reference to the kind of policy objectives it favoured. Monti, G. (2007) *EC Competition Law*, CUP, United Kingdom, p.161.

<sup>12</sup> Kroes, N. (2005) Preliminary Thoughts on Policy Review of Article 82, Speech at the Fordham Corporate Law Institute New York, 23 September 2005, <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/537&format=PDF&aged=1&language=EN&guiLanguage=en>> [accessed 30/09/2014], p.3.

<sup>13</sup> Faull, J. and Nikpay, A. (2007) *The EC Law of Competition*, 2<sup>nd</sup> Edition, OUP, Great Britain, p.335.



Art.102.<sup>14</sup> The body of cases as a whole contains references to several objectives, and they do not always or even often explain how they relate to each other.<sup>15</sup> The case law establishes that the abusive conduct may violate Art.102 where it manipulates or prevents the flow of goods between the MSs, precludes access to market and sourcing of products or generates anti-competitive effects to the prejudice of consumers.<sup>16</sup>

It has been argued that in its earlier decisions, the CJEU favoured a “teleological” method and interpreted the competition provisions in a way that could achieve the integrationist goals of the Treaty.<sup>17</sup> Art.102 was primarily used to ensure the proper functioning of the Internal Market. The objective of Art.102 was viewed as maintaining undistorted competition in the Internal Market by safeguarding the competition that still exists on the market.<sup>18</sup> Some commentators argue that competition rules in the Treaty, including Art.102, should be considered in the light of the Treaty provisions which are designed to establish a single market, ensure the protection of the freedom to provide services or avoid discrimination on the grounds of nationality.<sup>19</sup> Whereas others oppose that the primacy of integration among the policy goals of EU competition law does not hold anymore.<sup>20</sup>

To date, at least before the modernisation of Art.102, the predominantly pursued objective under Art.102 in the case law is the objective of economic freedom, also known as “Ordoliberalism”: Although the EU Courts have never referred to the drafting history of Art.102, it has been widely argued that Art.102 is grounded in “Ordoliberal” thinking and

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<sup>14</sup> Dabbah, M. M. (2000) ‘Conduct, Dominance and Abuse in “Market Relationship”: Analysis of Some Conceptual Issues under Article 82 E.C’, *European Competition Law Review*, 21(1), p.45.

<sup>15</sup> Gerber, D. J. (2008a) “The Future of Article 82: Dissecting the Conflict”, in Ehlermann, C. and Marquis, M. (eds.), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, Hart Publishing, Great Britain, p.43-44. See also Whish, R. and Bailey, D. (2012) *Competition Law*, 7<sup>th</sup> Edition, OUP, Great Britain, p.19 ([M]any different policy objectives have been pursued in the name of competition over the years... Historically there has not been a single, unifying, policy that bound the development of EU... law together.’).

<sup>16</sup> Downing, R. and Jones, A. (2010) “Margin Squeezes in Telecommunications Markets”, in Anderman, S. and Ezrachi, A. (eds.), *Intellectual Property and Competition Law, New Frontiers*, OUP, Great Britain, p.221.

<sup>17</sup> Gerber, D. J. (1994) ‘The Transformation of European Community Competition Law?’, 35 *Harvard International Law Journal*, p.116-117.

<sup>18</sup> Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECR 215 and Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-0755.

<sup>19</sup> Vaughan, D., Lee, S., Kennelly, B. and Riches, P. (2006) *EU Competition Law: General Principles*, Richmond Law & Tax Ltd, p.1.

<sup>20</sup> Cseres, K. J. (2006) ‘The Controversies of the Consumer Welfare Standard’, *The Competition Law Review*, 3(2), p.151-152.

has “Ordoliberal” origins.<sup>21</sup> The ideas of Ordoliberalism, developed by the Freiburg School,<sup>22</sup> took shape in Germany in the 1930s. Ordoliberals identified the accumulation of private economic power and wealth as a potential problem, and believed that in order to prevent such power turning into a political power, it was imperative to establish an appropriate economic order to protect individual economic freedom.<sup>23</sup> According to this line of thought, individual economic freedom is an essential accompaniment to political freedom and competition is necessary for the economic liberty and equality of individuals.<sup>24</sup> The primary goal of ordoliberal competition lies in the protection of “economic freedom” as a value in itself.<sup>25</sup>

In essence, this school of thought considers that the presence of dominant firms weakens the competitive process and reduces the economic freedom of other market participants.<sup>26</sup> According to the Ordoliberal philosophy, Art.102 seeks to prevent harm to the residual competition on a market where competition is already weakened by the presence of a dominant firm. The Ordoliberal approach seems to presume that dominance itself is a threat to competition and weakens the competitive structure of market; therefore, it reduces the economic freedom of other firms. The idea is that economic system should

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<sup>21</sup> See generally Kallaugher, J. and Sher, B. (2004) ‘Rebates Revisited: Anti-competitive Effects and Exclusionary Abuse under Article 82’, *European Competition Law Review*, 25(5), p.268 (‘It is well established that the origin, development, and application of competition rules under the EEC Treaty was based on the policy and legal structure of... “ordoliberal” ideology...’); Gormsen, L. L. (2005) ‘Article 82 EC: Where Are We Coming from and Where Are We Going to?’, *The Competition Law Review*, 2(2), p.19 (‘Article [102] was very much a product of ordoliberal thought’); Rousseva, E. (2007) “Objective Justification and Article 82 EC in the Era of Modernisation”, in Amato, G. and Ehlermann, C. D. (eds.), *EC Competition Law: A Critical Assessment*, Hart Publishing, Great Britain, p.379 (‘The application of Article [102] has largely been influenced by the ordo-liberal school of thought...’); McMahon, K. (2009) “A Reformed Approach to Article 82 and the Special Responsibility Not to Distort Competition”, in Ezrachi, A. (ed.), *Article 82 EC: Reflections on Its Recent Evolution*, Hart Publishing, United Kingdom, p.130 (‘[T]he theoretical foundations of EC competition law are strongly linked to the ideas of ordoliberalism’); Riziotis, D. (2008) “Efficiency Defence in Article 82 EC”, in Mackenrodt, M. O., Gallego, B. C. and Enchelmaier, S. (eds.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, Springer, Germany, p.95 (‘[O]rdoliberal principles of competition policy... influenced the European competition law from its very beginning.’); and Kavanagh, J., Marshall, N. and Niels, G. (2009) “Reform of Article 82 EC – Can the Law and Economics be Reconciled?”, in Ezrachi, A. (ed.), *Article 82 EC: Reflections on Its Recent Evolution*, Hart Publishing, United Kingdom, p.3 (‘Article [102] policy in Europe has traditionally been influenced by the “ordo-liberal school”.’).

<sup>22</sup> Franz Böhm, Wernhard Möschel, Walter Eucken and Wilhelm Röpke are amongst the most well-known adherents to this school of thought.

<sup>23</sup> Gormsen, L. L. (2007) ‘The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC’, *European Competition Journal*, 3(2), p.332.

<sup>24</sup> *ibid* at p.332-333.

<sup>25</sup> *ibid* at p.331.

<sup>26</sup> Kavanagh, Marshall and Niels (2009), p.3.

allow all individuals the freedom to participate in the marketplace unimpaired by the power of other firms. In determining whether the conduct of a dominant undertaking impairs the freedom to participate in the marketplace, the Ordoliberalists distinguished between “*Leistungswettbewerb*”, which can be translated as “performance-based competition” or “normal competition”, and “*Behinderungswettbewerb*” which can be translated as “impediment competition” or “non-performance-based competition”.<sup>27</sup> In this distinction, the former is permitted, while the latter is prohibited.

Ordoliberalism gives priority to the preservation of the competitive structure of the market and attaches importance to protecting the process of rivalry and competitors’ freedom to compete. It aims to protect competition by protecting the structure of the market based on the belief that having as many firms as possible in a market is a sign of competition. Ordoliberals assume that market would always be more competitive with more suppliers and consumers would necessarily benefit from increased competition, if new firms enter the market.<sup>28</sup> For this reason, small- and medium-sized firms deserve a certain degree of protection from the exercise of market power with a view to establishing a free order which liberates individual economic freedom. Under this objective, conduct is regarded as an abuse, or “*Behinderungswettbewerb*”, when it restricts the freedom of or impairs the right of competitors to actively participate in the market unimpaired by the market power of a dominant firm. Whether the excluded competitors have been delivering less to consumers than a more efficient dominant firm is of no concern in this respect.

As will be seen, in sharp contrast to the core of the modernisation of Art.102, the economic freedom approach is not concerned with consumer welfare or economic efficiency. It is a rights-based approach and is based on humanist values rather than economic concerns.<sup>29</sup> The Ordoliberal system treats individuals as ends in themselves and

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<sup>27</sup> For more information on these concepts, see Gerber, D. J. (2001) *Law and Competition in Twentieth Century Europe Protecting Prometheus*, OUP, Great Britain, Chapter 7, and Kallaugh and Sher (2004), p.269-272.

<sup>28</sup> Korah, V. (2011) “Guidance on the Commission’s Enforcement Priorities in Applying Article 82 to Abusive Exclusionary Conduct by Dominant Undertakings: From Protecting Freedom to Enter a Market to an Efficient Allocation of Resources to Increase Consumer Welfare”, in Pace, L. F. (ed.), *European Competition Law: The Impact of the Commission’s Guidance on Article 102*, Edward Elgar Publishing, Great Britain, p.9 and 15.

<sup>29</sup> Gormsen (2007), p.330 and 334.

not as the means of welfare.<sup>30</sup> Ordoliberals see economic efficiency as a generic term for growth and for the encouragement and development of technical progress; ‘it is only an indirect and derived result of individual economic freedom.’<sup>31</sup> This objective is essentially oriented towards individual freedom, with efficiency as its by-product, not an end in itself.<sup>32</sup> Again contrary to the modernisation, Ordoliberalism puts the emphasis on the form of conduct and the very presence of a dominant firm in a market rather than the effects of conduct on the market or on consumer welfare.

Despite the predominant view in the literature that Art.102 is significantly influenced by Ordoliberalism, harsh criticisms have been levelled against the economic freedom objective. It has been argued that this objective risks creating markets with more numerous, but less efficient and smaller competitors, who charge higher prices but offer less innovative products and ultimately less choice, while at the same time deterring dominant firms from investing and improving their offering as part of competition on the merits.<sup>33</sup> Criticisms have particularly come from the proponents of the consumer welfare approach. With the modernisation, the theoretical framework of Art.102, which has thus been shaped by Ordoliberal thoughts, is aimed to shift towards the consumer welfare objective with efficiency as its main product, rather than a by-product.<sup>34</sup>

### 1.1.3. Art.102 in the Case Law

Art.102 is drafted in a vague manner; neither the dominant position element, nor the abuse element, as the underlying elements of the Article, are not defined by the Treaty. Nowhere does the TFEU define the legal concepts of dominant position or abuse of a dominant position. However, this is in tune with the overall drafting of the original Treaties: they are a *traité cadre* allowing for the evolution and development of EU law definitions. As with most Articles of the Treaties, the underlying elements of Art.102 are therefore left to the

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<sup>30</sup> McMahon (2009), p.130.

<sup>31</sup> Gormsen (2007), p.337.

<sup>32</sup> CLF (2005) ‘The Reform of Article 82: Recommendations on Key Policy Objectives’, *European Competition Journal*, 1(1), p.181.

<sup>33</sup> *ibid* at p.183.

<sup>34</sup> See *infra* “1.2.3. Consumer Welfare as a New Objective for Art.102”.

interpretation of the EU Courts,<sup>35</sup> while the Commission also plays an important role in the day to day interpretation of the Article.<sup>36</sup> The practical meaning of Art.102 has evolved over time through the case law of the EU Courts. The first judgments on Art.102 began to emerge in the late 1970s and there was hardly any case before this era.<sup>37</sup>

The definition of “dominant position” preceded the definition of “abuse of a dominant position”. In *United Brands*, the CJEU defined the legal concept of dominant position as ‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.’<sup>38</sup> This definition can be taken to mean that a dominant firm has the power to unilaterally set the parameters of competition, such as price, output and product variety without being constrained by the decisions of its competitors, customers or consumers. The definition set out by the CJEU largely corresponds to the concept of “significant market power”<sup>39</sup> and has been reiterated in the case law.

A dominant position is not an absolute term but a matter of degree, and the degree of market power will depend on the circumstances of each case.<sup>40</sup> Market power derives from a combination of several factors. In this respect, market share stands out as the first and most important element in the assessment of dominant position.<sup>41</sup> The CJEU held in *Hoffmann La Roche* that ‘very large market shares’ are highly significant evidence of the

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<sup>35</sup> See Art.263 TFEU and Art.267 TFEU for the jurisdiction of the CJEU to interpret the Treaty provisions, in this respect Art.102.

<sup>36</sup> Pursuant to Art.17 TEU, the Commission is responsible for the enforcement of EU rules, and in this respect ensures the application of Art.102 under the judicial review of the EU Courts. Especially with the increasing use of Art.9 Regulation 1/2003 commitments in recent years, the Commission has *de facto* proved its important role in shaping the enforcement of Art.102. See *infra* “3.3.3. The Role of the Commission in the Post-Guidance Period”.

<sup>37</sup> The lack of enforcement in the 1960s led to the concern that Art.102 TFEU would simply remain as a ‘dead letter’. Gerber, D. J. (1987) ‘Law and the Abuse of Economic Power in Europe’, 62 *Tulane Law Review*, p.87.. See also Szyszczak, E. (2010) ‘Controlling Dominance in European Markets’, 33 *Fordham Int’l L.J.*, p.1751 (‘In the.. early years, enforcement of article 102 TFEU was almost non-existent.’).

<sup>38</sup> Case 27/76 *United Brands v Commission* [1978] ECR 207, para.65.

<sup>39</sup> It is well-trodden in the industrial organisation literature that a dominant firm with significant market power has the capability to raise price (above marginal cost), reduce output, diminish choice or stifle innovation without being constrained by its competitors, customers or consumers. Carlton, D. W. and Perloff, J. M. (2005) *Modern Industrial Organization*, 4<sup>th</sup> Edition, Pearson Addison Wesley Press, USA, p.200.

<sup>40</sup> O’Donoghue and Padilla (2013), p.143.

<sup>41</sup> *ibid.*

existence of a dominant position.<sup>42</sup> It found in *AKZO* that a stable market share of 50 percent or more is normally indicative of dominance.<sup>43</sup> Market shares of below 50 percent were also found to have amounted to a dominant position in some cases.<sup>44</sup> Most recent cases on Art.102 usually involve dominant positions almost amounting to statutory monopolies,<sup>45</sup> *de facto* monopolies<sup>46</sup> or legal monopolies granted by intellectual property rights.<sup>47</sup> Arguably, the increasing use of Art.9 Regulation 1/2003 commitments has rendered the analysis of dominance down to a “preliminary finding” and focused more on the abuse element.<sup>48</sup>

The second underlying element of Art.102, which is also the most controversial part of the Article, is the abuse element. The first founding Art.102 case that was brought before the CJEU in the context of annulment proceedings against a Commission decision was *Continental Can*<sup>49</sup> in 1973, almost more than fifteen years after the entry into force of the Treaty of Rome in 1957. In this case, the Court did not lay down a definition of the concept of abuse, but importantly it established two different types of abuse, which have been widely accepted in the case law as well as in the literature. The CJEU held the view that Art.102 covers two different types of practices: One that damages consumers or customers of a dominant firm directly and the other that indirectly harms them through its impact on the structure of the market. Though they were not defined in this way in the judgment, the former were later called “exploitative abuses” and the latter called “exclusionary abuses”

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<sup>42</sup> Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, para.41.

<sup>43</sup> Case 62/86 *AKZO Chemie v Commission* [1991] ECR I-3359, para.60.

<sup>44</sup> In *United Brands*, the dominant firm was found to have had a market share of approximately 45 percent. Case 27/76 *United Brands v Commission* [1978] ECR 207. In *British Airways*, the market share of the dominant firm was even before 40 percent, around 39.7 percent. Case T-219/99 *British Airways v Commission* [2003] ECR II-5917. The Guidance now states that dominance is unlikely if the undertaking’s market share is below 40 percent. Guidance, para.14.

<sup>45</sup> Case C-280/08 *Deutsche Telekom AG v Commission* [2010] ECR I-9555, Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECR I-0000 and Case C-295/12 P *Telefónica SA and Telefónica de España SAU v European Commission* [2014] ECR I-0000.

<sup>46</sup> Case COMP/39.530 *Microsoft (Tying)* [2010] OJ C36/7 and Case COMP/C-3/37.990 *Intel* [2009] OJ C227/07.

<sup>47</sup> Case COMP/38.636 *Rambus* [2010] OJ C30/17; Case AT.39939 *Samsung – Enforcement of UMTS SEP* [2014] OJ C350/8.

<sup>48</sup> See *infra* “3.3.3. The Role of the Commission in the Post-Guidance Period”.

<sup>49</sup> Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECR 215.

by commentators. Since then, much of the case law has been concerned with exclusionary abuses.<sup>50</sup>

It took almost a quarter of a century after the entry into force of the Treaty of Rome for the CJEU to define the concept of abuse of a dominant position in *Hoffmann La Roche* for the first time in 1979 as follows:

‘The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.’<sup>51</sup>

In the light of the definition, three elements come to the fore: First, abusive conduct must influence the structure of the relevant market. Second, it must generate the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition.<sup>52</sup> Lastly, there must be recourse to methods different from those which condition normal competition on the part of a dominant firm. It can be seen from its choice of words that the CJEU defined the concept more in line with the economic freedom objective. The structure of the market was stressed and there was no mentioning of consumers or of consumer welfare. The fact that the ‘very presence’ of a dominant undertaking as the reason for the weakening of competition was emphasised reveals the Ordoliberal view of dominant firms, rather than the consumer welfare perception which is more concerned with consumer benefits dominant firms may generate, instead of mere presence or size of these firms. Also the reference to ‘normal competition’ is indicative of the Ordoliberal concept of “*Leistungswettbewerb*”.

At first glance, the definition of the Court is intuitive: Conduct amounts to an abuse, if it is not a normal competitive practice. However, the definition itself necessitates a

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<sup>50</sup> See Jones, A. and Sufrin, B. (2014) *EU Competition Law: Text, Cases and Materials*, 5<sup>th</sup> Edition, OUP, Great Britain, p.371 (‘[T]he story of Article 102 has predominantly been one of action against exclusionary abuses.’) and Vickers, J. (2005) ‘Abuse of Market Power’, *The Economic Journal*, 115(504), p.F247 (‘[N]early all European cases have concerned exclusionary, rather than directly exploitative, conduct.’).

<sup>51</sup> Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, para.91.

<sup>52</sup> In *Post Danmark*, the CJEU inserted the expression “*to the detriment of consumers*” in between “the effect” and “of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”. Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECR I-0000, para.24. While this prima facie seems to be an emphasis on consumer harm in Art.102 cases, the Court’s use of the term “*in particular*” is important in that this may not necessarily be the case with every Art.102 case in practice.

further definition for “normal competition” and the test of “normal competition” requires a benchmark against which the conduct in question could be ruled as an abuse. In this respect, a widespread practice in competitive markets could be a typical benchmark: If a certain practice is available to and commonly practiced by non-dominant firms, then it should mean that such conduct does not amount to an abuse. However, the notion that a common practice within an industry would necessarily constitute normal competition was rejected by the GCEU.<sup>53</sup> A different, perhaps more popular, term that co-exists with “normal competition” is “competition on the merits”. Accordingly, a dominant firm is entitled to compete vigorously, as long as it does so by competing “on the merits”. Just as “normal competition”, “competition on the merits” is not a sufficiently clear concept. It is not always easy to reach agreement on whether to locate certain types of conduct in or out of the area circumscribed by competition on the merits.<sup>54</sup>

The case law definition of abuse has arisen much controversy among commentators. O’Donoghue and Padilla criticise the definition for being imprecise and failing to encapsulate a clear normative concept capable of satisfying the basic requirements of the rule of law and legal certainty.<sup>55</sup> Art and Colomo argue that the definition of abuse provides no precise benchmark or methodology for identifying its limits; therefore, it is examined as a matter of policy, not as a matter of law.<sup>56</sup> Osterud finds the definition vague and far from being clear-cut, and claims that it is difficult to determine whether a specific type of unilateral conduct falls within the scope of Art.102.<sup>57</sup> Nazzini regards the definition as not an ‘immediately operational test itself’.<sup>58</sup> Riziotis insists that a practical and useful positive

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<sup>53</sup> Case T-191/98 *Atlantic Container Line AB and Others v Commission* [2003] ECR II-3275, para.1124 (‘[C]onduct cannot cease to be abusive merely because it is the standard practice in a particular sector; to hold otherwise would deprive Article [102] of any effect.’). See also Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601.

<sup>54</sup> OECD (2005) *Competition on the Merits*, OECD Policy Roundtables, DAF/COMP(2005)27, <<http://www.oecd.org/dataoecd/7/13/35911017.pdf>> [accessed 30/09/2014], p.17.

<sup>55</sup> O’Donoghue and Padilla (2013), p.217.

<sup>56</sup> Art, J. and Colomo, P. I. (2010) “Judicial Review in Article 102 TFEU”, in Etro, F. and Kokkoris, I. (eds.), *Competition Law and the Enforcement of Article 102*, OUP, Great Britain, p.112. The authors claim that the definition of abuse is examined as a matter of policy, not as a matter of law. *ibid* at p.101.

<sup>57</sup> Osterud, E. (2010) *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: the Spectrum of Tests*, Kluwer Law International, The Netherlands, p.46.

<sup>58</sup> Nazzini, R. (2011) *The Foundations of European Union Competition Law: The Objective and Principles of Article 102*, OUP, United Kingdom, p.171.



definition for normal competition has proven to be unachievable until now.<sup>59</sup> Finally, Lowe draws a good analogy in this respect and finds that ‘just as physicists strive to find the theory that unifies Newtonian physics and quantum mechanics, so economists strive to find the theory that unifies the various aspects of anti-competitive unilateral conduct.’<sup>60</sup>

Because pinpointing what amounts to competition on the merits is difficult, if not impossible; one challenge in the case law has been to draw a line between lawful competitive conduct and abusive conduct under Art.102. Finding the appropriate dividing line between these two is very difficult even if the enforcers agree on the purpose of the law and methods to be deployed.<sup>61</sup> This is because conduct that benefits consumers through lower prices or new products also forecloses the market to competitors who have failed to cut down on their costs or bring new products to the market. For instance, the mechanism by which a dominant undertaking engages in predatory pricing, lowering prices, is the same mechanism by which it stimulates competition.<sup>62</sup> To date, the EU Courts have failed to provide a definition that successfully distinguishes conduct that should be tolerated on the part of dominant firms from conduct that should be prohibited as an abuse.<sup>63</sup> The enforcement of Art.102 suffers from this problem due to the vacuous definition of abuse.

A lack of coherent analytical approach to Art.102 in the case law is also criticised in the literature. Temple Lang and O’Donoghue note that the Commission and the EU Courts have dealt with individual cases that were said to raise questions by reference to the facts of the individual case, seemingly without having any clear general analytical or intellectual framework for doing so.<sup>64</sup> Whish and Bailey argue that the EU Courts have refrained from

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<sup>59</sup> Riziotis (2008), p.90.

<sup>60</sup> Lowe, P. (2006) Remarks on Unilateral Conduct, Session on International Enforcement Perspectives Federal Trade Commission and Antitrust Division Hearings on Section 2 of the Sherman Act, Washington DC, 11 September 2006, <[http://ec.europa.eu/competition/speeches/text/sp2006\\_019\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2006_019_en.pdf)> [accessed 30/09/2014], p.3. The author maintains that neither the physicists, nor the economists have yet found what they have been looking for.

<sup>61</sup> Monti, G. (2012) “Unilateral Conduct: The Search for Global Standards”, in Ezrachi, A. (ed.), *Research Handbook on International Competition Law*, Edward Elgar Publishing, Great Britain, p.365.

<sup>62</sup> Jones, A. (1995) ‘Distinguishing Predatory Prices from Competitive Ones: Tetra Pak II’, *European Intellectual Property Review*, 17(5), p.255.

<sup>63</sup> Whish, R. (2011) “National Competition Law Goals and the Commission’s Guidance on Article 82EC: The UK Experience”, in Pace, L. F. (ed.), *European Competition Law: The Impact of the Commission’s Guidance on Article 102*, Edward Elgar Publishing, Great Britain, p.154.

<sup>64</sup> Temple Lang, J. and O’Donoghue, R. (2002) ‘Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82EC’, 26 *Fordham Int’l L.J.*, p.83.

broad theoretical statements, preferring instead to decide each case on its merits.<sup>65</sup> Rousseva claims that even a cursory examination reveals that there is no conceptual consistency in the application of Art.102.<sup>66</sup> Lastly, Vickers accepts that case law suggests some standards to distinguish between lawful and unlawful behaviour for some types of conduct, but maintains that the underlying substantive principles are not always easy to discern.<sup>67</sup>

In the absence of one single coherent framework for all types of abuses, Art.102 cases have instead involved categories of potentially abusive conduct. There is much more precedent, as well as literature, on some categories of conduct than others. To indicate this, different expressions have been used by commentators and practitioners such as “main types of abuses”,<sup>68</sup> “principal forms of abuse”,<sup>69</sup> “traditional categories of abuse”,<sup>70</sup> and “most frequent types of abusive behaviour”<sup>71</sup> versus “other forms of abusive conduct”,<sup>72</sup> “other forms of abuse”,<sup>73</sup> and “miscellaneous abuses”.<sup>74</sup> Predatory pricing, exclusive dealing, rebates, tying and bundling and refusal to deal stand out as the most common categories of conduct that have been challenged under Art.102. Most recent cases on Art.102, however, involve seemingly new forms of abuses such as refusal to provide interoperability information,<sup>75</sup> abuse of regulatory procedures,<sup>76</sup> abuse of standard-essential patents,<sup>77</sup> long-term capacity bookings,<sup>78</sup> strategic underinvestment,<sup>79</sup> capacity hoarding<sup>80</sup> and manipulation of internet search results.<sup>81</sup>

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<sup>65</sup> Whish and Bailey (2012), p.197.

<sup>66</sup> Rousseva, E. (2010) *Rethinking Exclusionary Abuses in EU Competition Law*, Hart Publishing, Great Britain, p.503.

<sup>67</sup> Vickers (2005), p.F247.

<sup>68</sup> Etro, F. and Kokkoris, I. (2010) “Toward an Economic Approach to Article 102 TFEU”, in Etro, F. and Kokkoris, I. (eds.), *Competition Law and the Enforcement of Article 102*, OUP, Great Britain.

<sup>69</sup> Goyder, J. and Albors-Llorens, A. (2009) *EC Competition Law*, 5<sup>th</sup> Edition, OUP, Great Britain.

<sup>70</sup> Geradin, D. (2010) “Is the Guidance Paper on the Commission’s Enforcement Priorities in Enforcing Article 102 TFEU Useful?”, in Etro, F. and Kokkoris, I. (eds.), *Competition Law and the Enforcement of Article 102*, OUP, Great Britain.

<sup>71</sup> Kroes (2005).

<sup>72</sup> Goyder and Albors-Llorens (2009).

<sup>73</sup> Bellamy and Child (2008).

<sup>74</sup> Whish and Bailey (2012).

<sup>75</sup> Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601; Case AT.39840 *MathWorks* [2014] (case closure).

<sup>76</sup> Case C-457/10 *AstraZeneca v Commission* [2012] ECR I-0000.

<sup>77</sup> Case COMP/38.636 *Rambus* [2010] OJ C30/17; Case AT.39939 *Samsung – Enforcement of UMTS SEPs* [2014] OJ C350/8; Case AT.39985 *Motorola – Enforcement of GPRS SEPs* [2014] OJ C344/6.

It follows that the text of Art.102 is silent on the meaning of abuse and objective(s) of the Article, the definition of abuse by the CJEU is unsatisfactory and provides no methodology for identifying its scope, distinguishing “competition on the merits” from abusive conduct is challenging and there is a lack of coherent analytical approach to Art.102 in the case law. Therefore, the case law on abuse is ‘complex and controversial’.<sup>82</sup> This has important consequences for dominant firms as the subjects of the Article. On the part of dominant firms, it can be quite a difficult task to show that they are competing on the merits in the absence of a firmly accepted definition of what it means to do so.<sup>83</sup> If dominant firms are to be denied recourse to commercial strategies that are available to their non-dominant competitors, it is essential for them to know firstly whether they are dominant and secondly what conduct they must avoid.<sup>84</sup> It is against this background that there was a need for at least guidance, if not modernisation, on the enforcement of Art.102.

## **1.2. The Modernisation of Art.102**

### **1.2.1. Background to the Modernisation of Art.102**

During the last two decades, both the Commission and the EU Courts had been criticised for their “structuralist” positions in their decisions and judgments which often showed a high level of formalism and did not adequately take into account economic arguments or efficiency considerations. Both under Art.101 TFEU and under Art.102, they placed too much emphasis on forms or categories of behaviour, but too little emphasis on their effects on the market and/or consumers. Particularly Art.102 was subject to harsh criticism in the literature for lacking economic rigour.<sup>85</sup> Before the modernisation, some commentators

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<sup>78</sup> Case COMP/39.316 *Gaz de France* [2010] OJ C57/13; Case COMP/39.317 *E.ON Gas* [2010] OJ C278/9.

<sup>79</sup> Case COMP/39.315 *ENI* [2010] OJ C352/8.

<sup>80</sup> Case AT.39727 *CEZ* [2013] OJ C251/4.

<sup>81</sup> Press Release, “Antitrust: Commission probes allegations of antitrust violations by Google”, IP/10/1624, Brussels, 30 November 2010.

<sup>82</sup> Whish (2009), p.189.

<sup>83</sup> OECD (2005), p.18.

<sup>84</sup> Goyder and Albors-Llorens (2009), p.651.

<sup>85</sup> See generally Venit, J. S. (2005) ‘Article 82: The Last Frontier-Fighting Fire with Fire?’, 28 *Fordham Int’l L.J.*, p.1158 ([Art.102] has too often been based on an approach that has ignored the need for sound economic analysis.); Gormsen (2005), p.20 (‘It is accepted that some cases decided under Article [102]... are based on assumptions and not on solid economics.’); Petit, N. (2009) ‘From Formalism to Effects? The Commission’s Communication on Enforcement Priorities in Applying Article 82 EC’, *World Competition*, 32(4), p.485 (‘[T]he debate on Article [102] has been replete with passionate criticism of the European Commission’s... “forms-based approach”... of abuses of dominance.’); Geradin (2010), p.39 (‘Article 102 has been enforced

even regarded Art.102 as ‘a Community problem child’,<sup>86</sup> while for others the Article was ‘the last of the steam-powered trains’<sup>87</sup> because of it being the last piece of EU competition law that was finally subject to a review after almost 50 years of enforcement.

In spite of the case law, the Commission has listened to criticism and to calls for it to abandon its formalistic methodology.<sup>88</sup> To address the concerns and calls for changes in the enforcement, the Commission engaged in a series of reforms with the ultimate aim of modernising the way it enforces EU competition law rules. The modernisation of EU competition law was not confined to Art.102 and instead began in the area of vertical restraints under Art.101 TFEU with the adoption of Regulation 2790/1999.<sup>89</sup> The modernisation started with vertical agreements because the view was that these seldom restrict competition and often lead to efficiencies for the benefit of consumers.<sup>90</sup> The officials in the DG Comp, who came to believe in the objective of encouraging efficiency after the first EUMR in 1989,<sup>91</sup> started by considering reform of the treatment of vertical agreements on the grounds that their reform would be easier than that of horizontal agreements or abuse of a dominant position.<sup>92</sup>

As the first formal document of the modernisation of EU competition law, Regulation 2790/1999 started the shift towards a consumer welfare-oriented approach to vertical agreements. Regulation 2790/1999 introduced a “safe harbour” for vertical agreements: Where the market share of the undertaking (supplier) does not exceed 30

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very strictly by the Commission, which often took positions hard to reconcile with basic economics.’); Whish and Bailey (2012), p.208 (‘[T]here has been much criticism that the law and policy of Article 102 has been insufficiently aligned with sound economic principles.’); O’Donoghue and Padilla (2013), p.267 (‘One of the recurrent criticisms of the older decisional practice and case law under Article 102 TFEU is that abuses were made out on largely formalistic grounds, with little or no regard to any forensic demonstration of anticompetitive effects.’); and Jones and Sufrin (2014), p.382 (‘One of the most criticised aspects of the application of Article 102 over the years has been the use of “form” rather than “effects” based analysis.’).

<sup>86</sup> Venit (2005), p.1159.

<sup>87</sup> Sher (2004), p.243.

<sup>88</sup> Downing and Jones (2010), p.222.

<sup>89</sup> Commission Regulation (EC) No 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336/21. This Regulation is replaced with Commission Regulation (EU) No 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices [2010] OJ L102/1.

<sup>90</sup> Korah, V. (2010) “Foreword: The Reform of EC Competition Law: The Challenge of an Optimal Enforcement System”, in Lianos, I. and Kokkoris, I. (eds.), *The Reform of EC Competition Law: New Challenges*, Kluwer Law International, Great Britain, p.xxv.

<sup>91</sup> Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings [1989] OJ L257.

<sup>92</sup> Korah (2011), p.11.

percent, vertical agreements which do not contain “hard-core restrictions” are thought to create efficiencies in production or distribution and yield consumer benefits.<sup>93</sup> Shortly after, the Commission issued Guidelines on vertical restraints<sup>94</sup> which, together with Regulation 2790/1999, formed the basis for a more economic competition policy towards vertical agreements.<sup>95</sup> Guidelines on vertical restraints state that the Commission will adopt ‘an economic approach’ based on vertical agreements’ ‘effects on the market’ and will analyse vertical agreements ‘in their legal and economic context’.<sup>96</sup> Guidelines on the applicability of Art.101 TFEU to horizontal cooperation agreements similarly adopt an effect analysis to horizontal cooperation agreements.<sup>97</sup>

Published in 2004 as a further reform in this respect, Guidelines on the application of Art.81(3) EC (now Art.101(3) TFEU) made the shift even clearer. This time, the objective of ‘enhancing consumer welfare and of ensuring an efficient allocation of resources’ is clearly attributed to Art.101 TFEU.<sup>98</sup> These Guidelines also employ an effects-based approach to “restrictions of competition by effect”, and thus differentiate them with “restrictions of competition by object”.<sup>99</sup> Many other consumer welfare-oriented rules and effects-based assessments are included in other Regulations and Guidelines such as Regulation 772/2004 on the application of Art.81(3) TFEU to technology transfer agreements,<sup>100</sup> Guidelines on the application of Art.81(3) TFEU to technology transfer agreements,<sup>101</sup> Regulation 1217/2010 on application of Art.101(3) TFEU to research and

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<sup>93</sup> Regulation 2790/1999, para.8.

<sup>94</sup> Guidelines on vertical restraints [2000] OJ C291/1. These Guidelines are replaced with the Guidelines on vertical restraints [2010] OJ C130/1 which state in para.7 that the objective of Art.101 TFEU is to ensure that undertakings do not use vertical agreements to restrict competition ‘to the detriment of consumers’.

<sup>95</sup> Lowe, P. (2007) Consumer Welfare and Efficiency - New Guiding Principles of Competition Policy?, Speech at 13<sup>th</sup> International Conference on Competition and 14<sup>th</sup> European Competition Day, Munich 27 March 2007 <[http://ec.europa.eu/competition/speeches/text/sp2007\\_02\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2007_02_en.pdf)> [accessed 30/09/2014], p.4.

<sup>96</sup> Guidelines on vertical restraints [2000], para.7.

<sup>97</sup> Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/2, para.17. These Guidelines are replaced with the Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements [2011] OJ C11/1.

<sup>98</sup> Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, para.13.

<sup>99</sup> *ibid* at paras.19-25.

<sup>100</sup> Commission Regulation (EC) No 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements [2004] OJ C123/11. This Regulation is replaced with the Commission Regulation (EU) No 316/2014 on the application of Article 101(3) TFEU to categories of technology transfer agreements [2014] OJ L93/17.

<sup>101</sup> Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements [2004] OJ C101/2. These Guidelines are replaced with the Guidelines on the application of Article 101(3) TFEU to technology transfer agreements [2014] OJ C89/3.

development agreements<sup>102</sup> and finally Regulation 1218/2010 on the application of Art.101(3) TFEU to specialisation agreements.<sup>103</sup>

The other pillar of EU competition law, namely mergers, was not left outside the scope of the modernisation. An important reform was made in 2004 with the issue of the new EUMR.<sup>104</sup> The EUMR forms the basis for the Commission's more-economic approach, which is intended to ground EU merger analysis more firmly in modern industrial organisation theory, based on a consumer welfare standard.<sup>105</sup> The EUMR moved away from the more structural concept of dominant position to make clear that all anti-competitive mergers resulting in higher prices, less choice or innovation -in other words: causing consumer harm- are covered.<sup>106</sup> The old dominance test was replaced with the new significant impediment to effective competition (SIEC) test which is more suitable for evaluating the effects of complex mergers. Similar to agreements under Art.101 TFEU, the structuralist approach to mergers was thus reformed and the idea that mergers may also create efficiencies and benefit consumers gained ground.

The primary legislation on mergers is complemented with Guidelines on horizontal and non-horizontal mergers. Guidelines on the assessment of horizontal mergers state that the Commission will prevent mergers that would be likely to deprive consumers of low prices, high quality products and innovation through its control of mergers.<sup>107</sup> These Guidelines involve an effects-based approach to mergers based on "coordinated" and "non-coordinated" effects that may arise out of mergers,<sup>108</sup> and accept the notion that mergers may bring about various types of efficiency gains that can lead to benefits to consumers.<sup>109</sup> Guidelines on the assessment of non-horizontal mergers also contain many references to

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<sup>102</sup> Commission Regulation (EU) No 1217/2010 on the application of Article 101(3) TFEU to certain categories of research and development agreements [2010] OJ L335/36.

<sup>103</sup> Commission Regulation (EU) No 1218/2010 on the application of Article 101(3) TFEU to certain categories of specialisation agreements [2010] OJ L335/43.

<sup>104</sup> Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1.

<sup>105</sup> Maier-Rigaud, F. and Parplies, K. (2009) 'EU Merger Control Five Years after the Introduction of the SIEC Test: What Explains the Drop in Enforcement Activity?', *European Competition Law Review*, 30(11), p.565.

<sup>106</sup> Lowe (2007), p.5.

<sup>107</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para.8.

<sup>108</sup> *ibid* at paras.22-57.

<sup>109</sup> *ibid* at para.80.

efficiency and consumer welfare<sup>110</sup> and take the view that the fact that competitors may be harmed because the merger creates efficiencies cannot in itself give rise to competition concerns.<sup>111</sup> All of these documents reflect a clear willingness on the part of the Commission to embrace the economic thinking in the areas of agreements and mergers at the time.<sup>112</sup> No comparable documents had existed under Art.102 until late 2008 before the publication of the Guidance.

### **1.2.2. Art.102 and Formalism**

Modernisation of Art.101 TFEU and merger control has shown a relatively successful movement towards a more effects-based and consumer welfare-oriented approach from the previous form-based Ordoliberal approach. However, the same cannot be said in the context of Art.102. Although the Commission was able to radically change its attitude to efficiency in the context of vertical agreements in the 1990s, it had more difficulty in changing the interpretation of Art.102.<sup>113</sup> This is because officials within the DG Comp were not agreed that access to markets was desirable only if the new entrants were likely to be as efficient as the incumbents, implying that the goal of efficiency was not found to be justifiable under Art.102 when rivals were foreclosed from the market.<sup>114</sup> Also the EU Courts appeared to be less supportive of the modernisation of Art.102 compared to the modernisation of Art.101 TFEU and merger control, and tended to follow their old formalistic case law on Art.102 even after the Commission started its review of Art.102.

It has been argued that a form-based approach to unilateral conduct was first adopted when EU competition law was in its infancy and it was considered that reasonably clear rules were needed to address conduct which impeded trade between MSs, since at that time economic analysis was less developed and could not provide a clear view of the effects of practices on competition.<sup>115</sup> The formalistic manner the EU authorities have applied competition rules in the EU is often compared with the enforcement on the other

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<sup>110</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6, paras.10, 13, 21, 28 and 52.

<sup>111</sup> *ibid* at para.16.

<sup>112</sup> O'Donoghue and Padilla (2013), p.69.

<sup>113</sup> Korah (2011), p.16.

<sup>114</sup> *ibid*.

<sup>115</sup> CLF (2005), p.181.

side of the Atlantic. While in US antitrust law conduct is held abusive only when both the exclusionary effects of conduct and a reduction in consumer welfare appear together, in the EU the analysis used to centre on the special responsibility of dominant undertakings to protect existing small, often inefficient, competitors and takes account of possible damage to such competitors.<sup>116</sup> The European authorities have shown a continuing interest in preserving “rivalry” as such by protecting business firms against the results of intensive competition.<sup>117</sup> There seems little doubt that EU competition law has, in some cases, been applied with competitors in mind.<sup>118</sup>

The US law of monopolization stresses the costs of antitrust intervention, tending towards per se legality in a number of situations and otherwise imposing considerable burdens on plaintiffs to show how the particular conduct will increase market power and harm consumers, while the EU perspective on abuse of a dominant position stresses the process of competition and seeks to enable all market actors to compete on their merits.<sup>119</sup> Indeed, EU competition law is more concerned with the structure and openness of the market.<sup>120</sup> Starting from the Ordoliberal tradition, EU competition law had always viewed a dominant firm with suspicion rather than admiration.<sup>121</sup> The EU Courts have tended to create a wider zone of liability for dominant firms than the US courts.<sup>122</sup> European authorities appear to be substantially more active than their American counterparts.<sup>123</sup> For

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<sup>116</sup> Amato, G. (1997) *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market*, Hart Publishing, Great Britain, p.70-71. See *infra* “2.1.1. The Origin of the Idea of Special Responsibility”.

<sup>117</sup> Gifford, D. J. and Kudrle, R. T. (2003) ‘European Union Competition Law and Policy: How Much Latitude for Convergence with the United States?’, 48 *Antitrust Bulletin*, p.740.

<sup>118</sup> Whish and Bailey (2012), p.22. See also Szyszczak (2010), p.1753 (‘The case law indicates that article 102 TFEU was perceived as being used by the Commission and courts to protect competitors, not competition.’).

<sup>119</sup> Fox, E. M. (2014) ‘Monopolization and Abuse of Dominance: Why Europe is Different’, *Antitrust Bulletin*, 59(1), p.143.

<sup>120</sup> Papadopoulos, A. (2010) *The International Dimension of EU Competition Law and Policy*, CUP, Great Britain, p.24-25.

<sup>121</sup> Niels, G. (2009) ‘Abuse and Monopolization: Unilateral Conduct by Two Competition Authorities?’, *Global Competition Policy*, Feb-09 (1), p.9.

<sup>122</sup> Kovacic, W. E. (2008) ‘Competition Policy in the European Union and the United States: Convergence or Divergence in the Future Treatment of Dominant Firms?’, *Competition Law International*, October 2008, p.11.

<sup>123</sup> Schweitzer, H. (2008) “The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC”, in Ehlermann, C. and Marquis, M. (eds.), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, Hart Publishing, Great Britain, p.119.



all those reasons, the US treatment of dominant firms is generally less ‘intervention-minded’ than the EU treatment.<sup>124</sup>

Many examples from the case law in fact show the apparent formalism in the context of Art.102. In *Cewal*, the GCEU explicitly stated that it was ‘*irrelevant* whether [the] conduct actually did or did not have a restrictive effect on competition’ and took the view that where a dominant firm implements a practice ‘whose *aim* is to remove a competitor, the fact that the result sought is not achieved is not enough to avoid the practice being characterized as an abuse’.<sup>125</sup> In *Irish Sugar*, the GCEU ruled that Art.102 does not distinguish between the “object” and the “effect” of unilateral conduct, implying that in the presence of an object to abuse a dominant position, the assessment of effects will then be irrelevant.<sup>126</sup> This reasoning culminated in *Michelin II* where the GCEU held that anti-competitive effects need not be examined, if the conduct seems *capable* of generating such effects:

‘The effect referred to in the case-law... does not necessarily relate to the actual effect of the abusive conduct complained of. For the purposes of establishing an infringement of Article [102], *it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect*... It follows that, for the purposes of applying Article [102], establishing the anti-competitive object and the anti-competitive effect are one and the same thing... If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect.’<sup>127</sup>

*Michelin II* is in fact the hallmark of the form-based approach in the EU before the modernisation. In this case, Michelin’s standard volume rebate scheme was found ‘loyalty-inducing’<sup>128</sup> by the GCEU and its effects were deemed as irrelevant since the ‘purpose’ of the rebate scheme was to tie the dealers to Michelin and to make it more difficult for

<sup>124</sup> Kovacic, W. E. (2007) ‘The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix’, *Columbia Business Law Review*, 1(1), p.4.

<sup>125</sup> Joined Cases T-24/26 and 28/93 *Compagnie Maritime Belge Transports SA and Others v Commission* (Cewal) [1996] ECR II-1201, para.135 and 149 (emphasis added). See also Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805, para.331 (‘[T]he scope of Article [102] covers behaviour which is aimed at or capable of achieving anticompetitive effects, regardless of its success.’).

<sup>126</sup> Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969, para.170.

<sup>127</sup> Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission* [2003] ECR II-4071, para.239-241 (“*Michelin II*”) (emphasis added).

<sup>128</sup> Loyalty rebates were found as an abuse in *Hoffmann La Roche*, but the CJEU created the impression that volume (quantity) rebates linked to customers’ purchasing volume would be permissible under Art.102. Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461. *Michelin II*, however, showed that even quantity rebates could have a ‘loyalty-inducing’ nature and could thus be prohibited under Art.102.

competitors to enter the market.<sup>129</sup> Michelin defended that its markets share fell constantly over a period of time, new competitors entered the market and prices were falling, but the Court dismissed all of those arguments and assumed effects by holding that ‘any loyalty-inducing rebate system applied by an undertaking in a dominant position has foreclosure effects prohibited by Article [102]’.<sup>130</sup> Thus the Court *practically* created a per se illegality rule for loyalty rebates and loyalty-inducing rebates under Art.102, unless the dominant undertaking in question provides an objective justification. The rationale was simple that loyalty rebates requiring the customer to purchase all or almost all of its supplies from a dominant firm would foreclose the market to competitors, and a reduction in the number of competitors would not be in the best interests of the structure of that market.<sup>131</sup>

Formalism was also prevalent in *British Airways*.<sup>132</sup> In this judgment, the GCEU disregarded an effects-based analysis and held that it was ‘not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned.’<sup>133</sup> Not only effects on the market, but also effects on consumers were irrelevant. According to the GCEU, Art.102 ‘does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers’.<sup>134</sup> The Court maintained that Art.102 concentrates upon ‘protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected.’<sup>135</sup> At the end, the Court did not examine in detail the effects of British Airways’ rebate scheme on the market or on consumers and found that it was likely to generate anti-competitive effects based on the fact that 85 percent of sales were made through its customers.<sup>136</sup> British Airways’ argument that

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<sup>129</sup> *Michelin II*, para.244.

<sup>130</sup> *ibid* at para.65.

<sup>131</sup> In *Michelin I*, the CJEU held that the rebate scheme of Michelin was abusive in that it ‘restricted dealers’ freedom of choice, thereby causing them to be treated unequally and restricting access to the market for other manufacturers’. Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461, para.62 (“*Michelin I*”). The CJEU disregarded an analysis based on effects and instead held that Michelin’s target rebates restricted the ‘freedom’ of suppliers in a manner that is in line with the economic freedom objective. See also Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969, p.214 for a similar line of thought.

<sup>132</sup> Case T-219/99 *British Airways v Commission* [2003] ECR II-5917.

<sup>133</sup> *ibid* at para.293.

<sup>134</sup> *ibid* at para.264.

<sup>135</sup> *ibid*.

<sup>136</sup> *ibid* at para.295.

there was not any anti-competitive effect arising from its rebate system and it was losing market shares to its competitors during the relevant period was rejected.<sup>137</sup>

In *Wanadoo*, the CJEU took the view that a dominant firm commits an abuse ‘where, in a market *the competition structure of which is already weakened by reason precisely of the presence of that undertaking*, it operates a pricing policy the sole economic objective of which is to eliminate its competitors’.<sup>138</sup> In *British Gypsum*, the GCEU held that ‘appraisal of the effects... on the functioning of the market concerned depends on the characteristics of that market’ and maintained by citing a seminal effects-based judgment under Art.101 TFEU<sup>139</sup> that ‘it is necessary, in principle, to examine the effects of such commitments on the market’.<sup>140</sup> However, the Court concluded that ‘[b]ut those considerations, *which apply in a normal competitive market situation*, cannot be unreservedly accepted in the case of a market where, *precisely because of the dominant position of one of the economic operators, competition is already restricted*.’<sup>141</sup> This finding was in line with the Ordoliberal approach which mainly considers the very presence of dominant undertakings as a sign for the weakening of competition.

Taken together, there was an apparent formalism in the case law and it seemed to be quite easy for dominant undertakings to find themselves in breach of Art.102. Some of the abovementioned cases clearly show that the presence of a dominant position almost “justified” a lack of a need for analysing effects, and all those cases were in fact upheld quite easily by the EU Courts. In general, the EU Courts were satisfied if the Commission showed the expected exclusionary effects of conduct and as a result, practices with exclusionary potential were presumed to be abusive unless an objective justification could be put forward by dominant firms.<sup>142</sup> Despite being rare, some *ad hoc* effects-based judgments do exist.<sup>143</sup> Notwithstanding, equating object with effect appears to be dangerously broad in that it could allow a finding of abuse to be detached from any real

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<sup>137</sup> *ibid* at para.255.

<sup>138</sup> Case C-202/07 *France Télécom v Commission* [2009] ECR I-2369, para.107 (emphasis added).

<sup>139</sup> Case C-234/89 *Stergios Delimitis v Henninger Bräu* [1991] ECR I-935.

<sup>140</sup> Case T-65/89 *BPB Industries Plc and British Gypsum v Commission* [1993] ECR II-0389, para.66.

<sup>141</sup> *ibid* at para.67 (emphasis added).

<sup>142</sup> Blanco and Colomo (2011), p.75.

<sup>143</sup> See, for example, Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653 where the GCEU did not condemn the exclusive dealing of a dominant firm per se abusive under Art.102 and ruled that some degree of foreclosure in the market has to be shown.

analysis of effects.<sup>144</sup> Also, there have been occasions on which conduct of a dominant firm did not have or could not have had any harmful effect on consumers, and may have even been pro-competitive.<sup>145</sup> It can be observed that the role of economics-based assessments on Art.102 had thus been less influential compared to Art.101 TFEU and the EUMR.

Nevertheless, along with advances in the modern economic thinking on unilateral conduct, especially with the rise of the Chicago School in the US,<sup>146</sup> the attitude towards dominant firms has begun to change and the tide has shifted in favour of dominant firms. Commentators have come to realise that despite their market power, dominant firms can also bring benefits to consumers which can be identified once the focus is moved away from structuralist parameters. From this new point of view, formalism risks creating markets with numerous, but less efficient competitors, who charge higher prices but offer less innovative products and less choice, while at the same time deterring dominant firms from investing and improving their offerings.<sup>147</sup> Accordingly, if the form-based approach was leading to outcomes where competition was actually discouraged rather than promoted, this would contradict with the very essence of competition law.<sup>148</sup> The modernisation of Art.102 in line with the modern economic thinking would steer the enforcement from such drawbacks of formalism on the one hand, and bring it more in line with the reforms made in the context of Art.101 TFEU and merger control on the other hand.

### **1.2.3. Consumer Welfare as a New Objective for Art.102**

In recent years many competition authorities have stressed the central importance of consumer welfare when applying competition law and as a result, the consumer welfare standard is currently in the ascendancy.<sup>149</sup> Achieving economic efficiency and maximising consumer welfare are today considered the main goals of competition law.<sup>150</sup> Most economists have come to think that the main, if not the only, goal of competition law

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<sup>144</sup> Monti (2007), p.331.

<sup>145</sup> Whish (2011), p.154.

<sup>146</sup> See Chapter 2.

<sup>147</sup> CLF (2005), p.183.

<sup>148</sup> See also Whish (2011), p.155 ('[T]he possibility exists that Article [102] might actually discourage competition "on the merits" on the part of dominant undertakings, a somewhat perverse outcome for a system of law that is based on the principle that competition delivers better outcomes for society than monopoly.').

<sup>149</sup> Whish and Bailey (2012), p.19. See also Goyder and Albers-Llorens (2009), p.12 ('[C]onsumer welfare considerations are now in the ascendancy in the EU system.').

<sup>150</sup> Dabbah, M. M. (2010) *International and Comparative Competition Law*, CUP, Great Britain, p.40.

should be to prevent any unilateral (or collective) practice that harms consumers and reduces the efficiency of markets.<sup>151</sup> There is now a growing recognition that sound economic analysis should be made to identify the effects on consumers before ruling a certain practice as an abuse. It has been suggested that the effectiveness, efficiency and coherence of EU competition law requires a modernised approach to Art.102, involving the analysis of effects of conduct on competition in the market and on consumer welfare.<sup>152</sup>

With the modernisation of Art.102, the Commission has been trying to adopt the new consumer welfare objective as the guiding principle under Art.102 and to embrace an effects-based approach to Art.102. The modernisation involves ‘a tighter focus on consumer welfare and a more economic approach’<sup>153</sup> As one commentator has observed, the modernisation of Art.102 has three essential characteristics: First, strong emphasis is placed on the promotion of economic efficiency and consumer welfare. Second, only those practices that have the effect of harming consumers are to be prohibited. Third, the enforcement practice shall make increasing use of modern microeconomic insights and econometric tools when assessing abuse of a dominant position.<sup>154</sup> The former ‘legalistic straight-jacket approach’ has thus been rejected in favour of the more economics-based approach.<sup>155</sup> As a result, the EU has moved towards what can be seen as an ‘American-style’ competition law model.<sup>156</sup>

The consumer welfare objective is a “welfarist” approach which analyses, often through recourse to economic and econometric analysis, harm to consumers caused by the abusive conduct based on the belief that harm to competitors is the essence of competition and what matters at the end is, or should be, whether there is harm to consumers.<sup>157</sup> Under

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<sup>151</sup> Ahlborn, C. and Padilla, J. (2008) “From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law”, in Ehlermann, C. and Marquis, M. (eds.), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, Hart Publishing, Great Britain, p.61.

<sup>152</sup> CLF (2005), p.180.

<sup>153</sup> McMahon (2009), p.127.

<sup>154</sup> Wurmnest, W. (2008) “The Reform of Article 82 EC in the Light of the “Economic Approach””, in Mackenrodt, M. O., Gallego, B. C. and Enchelmaier, S. (eds.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, Springer, Germany, p.1.

<sup>155</sup> Hildebrand, D. (2009) *The Role of Economic Analysis in the EC Competition Rules*, Kluwer Law International, Great Britain, p.363.

<sup>156</sup> Gerber, D. J. (2008b) ‘Two Forms of Modernization in European Competition Law’, 31 *Fordham Int’l L.J.*, p.1259.

<sup>157</sup> See *infra* “2.3. From Harm to Competitors to Consumer Harm”.

this approach, protection of neither competition as an institution, nor the economic freedom of competitors is an aim in itself since the overall aim is the protection of consumer welfare as an outcome of the competitive process. Economic theory has made significant progress in the area of unilateral conduct and has found that many practices that were previously held to be an abuse have turned out to be justified by some pro-competitive justifications. Proponents of the consumer welfare objective argue that a sole focus on the issue of structure of the market affecting its outcome or the number of competitors in the market is problematic in the absence of an examination of the effects on consumer welfare.<sup>158</sup>

The consumer welfare objective is based on the belief that protecting inefficient competitors could burden the dominant firms by subsidising inefficient firms and lead to a reduction in consumer welfare. Therefore exclusion of inefficient firms as the result of conduct which does not harm consumers should not be regarded as a concern for competition law. This feature of the consumer welfare objective may be problematic *vis-à-vis* the old case law where protection of the market structure was in some cases found to be in the interests of consumers.<sup>159</sup> The fact of the matter is that the EU Courts' endorsement is required in order for the Commission to depart from the established jurisprudence.<sup>160</sup> Though cases, in particular the earlier ones, show traces of the economic freedom objective and formalism, it can be argued that the tide is nevertheless shifting towards the consumer welfare objective with the modernisation of Art.102.

### **1.3. Stages of the Modernisation of Art.102**

#### **1.3.1. The Modernisation at a Glance**

As discussed above, the modernisation of Art.102 does not exist in a vacuum; it is a part (in fact the last part) of the reform of EU competition law towards a more economic approach which first began in the area of vertical agreements under Art.101 TFEU. After a period of struggle to transform the law under Art.101 TFEU from form to effect and to introduce

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<sup>158</sup> See Gifford and Kudrle (2003), p.729 ('Accumulating economic evidence has largely discredited mere rivalry as a servant of consumers...'). Motta similarly argues that there is no proved correlation between the number of firms on the market and consumer or social welfare. Motta, M. (2004) *Competition Policy: Theory and Practice*, CUP, United Kingdom, p.22-23.

<sup>159</sup> See in particular Case C-95/04 *British Airways v Commission* [2007] ECR I-2331.

<sup>160</sup> See *infra* "3.1.1. Guidance on Enforcement Priorities Rather than "Guidelines on Art.102".

merger control, the Commission became free to focus its resources on Art.102.<sup>161</sup> The review of Art.102, as the last pillar of EU competition law to be reformed, began in the summer of 2003<sup>162</sup> and therefore ‘the air of change’ finally reached Art.102.<sup>163</sup> The review of Art.102 started within the DG Comp and after some internal debate, members of the competition authorities of MSs were invited to join the discussions.<sup>164</sup>

The earliest outcome of the modernisation appeared only in 2005 once the reform in the area of merger control was completed with the publication of the EUMR. The first piece of written work which was shared with public was the “An economic approach to Article 82”: Commissioned by the Chief Economist of the DG Comp, the EAGCP prepared a report in July 2005 which advocates a more economics-based approach into Art.102. It proposes that the emphasis should be placed on the economic analysis of anti-competitive effects of abusive conduct on consumers in the enforcement of Art.102, where decisions should be made on a case-by-case basis and based on sound economics. The EAGCP Report was produced independently from the DG Comp’s internal review process and it therefore does not present the position of the DG Comp.<sup>165</sup>

During the modernisation process, public statements by senior officials of the Commission shed light on the Commission’s likely analytical approach to Art.102. The then Competition Commissioner Kroes gave a speech few months later in September 2005.<sup>166</sup> Providing details on the modernisation process, she began by stating that she was ‘convinced’ that the exercise of market power must be assessed essentially on the basis of

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<sup>161</sup> Korah (2011), p.15.

<sup>162</sup> In June 2003, the then Competition Commissioner, Mario Monti, announced at the 8<sup>th</sup> Annual EU Competition Law and Policy Workshop in Florence that the Commission had started an internal review on the application of Art.102. See Introductory Statement by Mario Monti in Ehlermann, C. and Atanasiu, M. (2006) (eds.) *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?*, Hart Publishing, Great Britain, p.9.

<sup>163</sup> Lowe (2007), p.6.

<sup>164</sup> Lowe, P. (2006) Remarks on Unilateral Conduct, Session on International Enforcement Perspectives Federal Trade Commission and Antitrust Division Hearings on Section 2 of the Sherman Act, Washington DC, 11 September 2006, <[http://ec.europa.eu/competition/speeches/text/sp2006\\_019\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2006_019_en.pdf)> [accessed 30/09/2014], p.2.

<sup>165</sup> See Explanatory Note, available at

<[http://ec.europa.eu/dgs/competition/economist/note\\_eagcp\\_july\\_05.pdf](http://ec.europa.eu/dgs/competition/economist/note_eagcp_july_05.pdf)> [accessed 30/09/2014].

<sup>166</sup> See also Kroes, N. (2008) Exclusionary Abuses of Dominance - The European Commission’s Enforcement Priorities, Speech at the Fordham University Symposium New York, 25 September 2008, <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/457&format=PDF&aged=1&language=EN&guiLanguage=en>> [accessed 30/09/2014]; Lowe (2006) and Lowe (2007).

its effects in the market.<sup>167</sup> She explained that the Commission's intention was not to propose a radical shift in the enforcement policy, but to develop and explain theories of harm on the basis of a sound economic assessment for abusive conduct. According to Kroes, the enforcement of Art.102 should focus on 'real competition problems': that is, conduct that has actual or likely restrictive effects on the market, which harm consumers.<sup>168</sup>

With regard to the objective of Art.102, Kroes observed that Art.102 had been intrinsically concerned with 'fairness', and therefore not focused primarily on consumer welfare.<sup>169</sup> She brought consumer welfare to the fore and argued that the objective should be the protection of competition on the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources. She was concerned with two principles upon which the modernisation should be oriented: First, it should be competition and not competitors, that is to be protected and second, the ultimate aim should be to avoid consumer harm. Directly addressing the fundamental point in the EAGCP Report, she stated that attention should be paid to the fact that conduct may have efficiency-enhancing effects as well as foreclosure effects, and for this reason efficiencies should be included in the assessment.

Three months after this oft-quoted speech, the Commission published the Discussion Paper on the application of Art.102 in December 2005. The Discussion Paper is the first substantive outcome of the modernisation and the first document that aims to widen the analytical framework of Art.102. It was intended to only constitute an informal discussion on the future implementation of Art.102 by the Commission, and therefore was not published in the OJ. Even though it does not have enforcement status, the Discussion Paper still offers valuable insights into the concept of abuse of a dominant position and proposes a substantive assessment which takes into account the effects of abusive conduct on the market and on consumers. A quick review of the Discussion Paper will show that Kroes' key points are clearly reflected both in the wording of its paragraphs, as well as in the general tone of the document.

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<sup>167</sup> Kroes (2005), p.2.

<sup>168</sup> *ibid.*

<sup>169</sup> *ibid* at p.3.



The Discussion Paper was intended to be the Commission's first contribution to the discussion, not the Commission's last word.<sup>170</sup> Following the publication of the Discussion Paper in the Commission's website in December 2005, the Commission launched a formal public consultation and invited interested parties to submit their comments until March 2006. More than 100 submissions were received<sup>171</sup> and a public hearing was held in June 2006 focusing on the most common topical issues raised in those submissions.<sup>172</sup> In addition, the Discussion Paper was widely discussed at numerous conferences that took place in Europe, the US and Canada. Consequently, the Discussion Paper led to feverish debate as to the proper application of Art.102, in which a broad spectrum of views was expressed, ranging from a staunch defence of the *status quo* to demands for a radical reorientation of the existing case law.<sup>173</sup>

After years of extensive review and consultation process among leading academic economists and legal scholars, practitioners, and representatives of the business community, the Commission finally published the Guidance on the Commission's enforcement priorities in applying Art.102 to abusive exclusionary conduct by dominant undertakings in December 2008 as the next (and yet the final formal) stage in the modernisation process. The Guidance is intended to contribute to the process of introducing an effects-based approach for the application of Art.102 which has underpinned the Commission's thinking since the launching of the policy review,<sup>174</sup> and implies a determination to take proper account of the effects of unilateral conduct on the market and on consumers.

### **1.3.2. Report by the EAGCP: An Economic Approach to Art.82 EC**

The EAGCP Report is the first informal document that was issued in July 2005 during the modernisation process of Art.102. In line with the overall aim of the modernisation, the Report suggests a more economics-based approach to Art.102, which was quite different

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<sup>170</sup> Lowe (2006), p.3.

<sup>171</sup> See <<http://ec.europa.eu/competition/antitrust/art82/contributions.html>> [accessed 30/09/2014].

<sup>172</sup> See <<http://ec.europa.eu/competition/antitrust/art82/hearing.html>> [accessed 30/09/2014].

<sup>173</sup> Whish and Bailey (2012), p.175.

<sup>174</sup> Press Release, "Antitrust: Guidance on Commission enforcement priorities in applying Article 82 to exclusionary conduct by dominant firms – frequently asked questions", MEMO/08/761, Brussels, 3 December 2008.

from the approaches of the Commission and of the EU Courts at that time. The EAGCP Report articulates from the outset that it advocates an effects-based approach to Art.102, as opposed to a form-based approach. The Report sets out general principles in its Chapter 1, followed by the articulation of three different types of competitive harm (exclusion within one market, exclusion in adjacent markets and exclusion in vertically related markets) in Chapter 2 and their application to certain types of exclusionary practices (price discrimination, rebates, tying and bundling, refusal to deal, exclusive dealing and predatory pricing) in Chapter 3.

According to the EAGCP Report, an economics-based approach to the application of Art.102 implies that the assessment of each specific case will not be undertaken on the basis of the form that a particular business practice takes but rather will be based on the assessment of anti-competitive effects generated by that business behaviour (para.3). By focusing on effects rather than forms of conduct, an economics-based approach makes it more difficult for dominant undertakings to circumvent competition rules by way of attempting to achieve the same end results through the use of different unilateral practices (para.2). It also guarantees that the statutory provisions do not unduly thwart pro-competitive practices as many business practices may have different effects in different circumstances: Distorting competition in some cases and promoting efficiencies and innovation in others (paras.2-3).

The application of this approach is expected to require a competition authority or a court to explain in each case a competitive harm from the dominant firm's unilateral conduct and identify its detrimental effects on consumer welfare. If the conduct in question both generates anti-competitive effects and creates efficiencies (this is in fact one of the fundamental premises of the Report), then the competition authority or court should identify whether the anti-competitive effects are sufficiently outweighed by the efficiency gains and then how those efficiencies are passed on to consumers (para.3). Put another way, the first step is to identify and substantiate with economic arguments one of the three typologies of competitive harm<sup>175</sup> and determine any efficiency gain the conduct is capable

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<sup>175</sup> These are "exclusion within the same market" where a dominant firm excludes an actual competitor or a potential competitor, "exclusion in an adjacent market" where a dominant firm excludes competitors that are

of producing, followed by the second step of assessing whether efficiencies counterbalance anti-competitive effects or vice versa. Therefore, the Report calls for a balancing test.<sup>176</sup>

The EAGCP Report clearly requires the demonstration of effects on consumers. Throughout the Report, the main concern stands out as consumer welfare. Accordingly, anti-competitive effects are those which are generated on consumers, not merely on competitors. Conduct that harms consumer welfare is abusive.<sup>177</sup> In other words, competition is “on the merits” when conduct does not harm consumers, as the Report states that the standard for assessing whether a given practice is detrimental to competition or whether it is a legitimate tool of competition should be derived from the effects of the practice on consumers (para.8). The Report objects to the protection of competition with a view to preserving a particular market structure, since this may merely have the effect of protecting competitors from competition and enable them to maintain their presence in the market even though their offerings do not provide consumers with the best choices in terms of prices, quality or variety (para.9).

Since the proposed effects-based approach requires a departure from the form-based approach that the Commission and the EU Courts have relied upon thus far, the EAGCP Report also includes a section on procedure. As already mentioned, the first step is to determine the competitive harm of concern; there should be ‘a consistent and verifiable economic account of significant competitive harm’ (para.13). The assessment should be based on sound economic analysis and grounded on facts of each case. A competition authority or a court should identify the economic theory or theories on which the competitive harm is based, as well as the facts which support the theory as opposed to competing theories (para.15). The dominant firm may then come up with a convincing efficiency defence, which should be properly justified on the basis of sound economic analysis and grounded on facts. One radical aspect of the Report is that arguably it does not

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active in markets different but related to its main market and finally “exclusion in a vertically related market” which takes place in different stages of the production chain (paras.17-29).

<sup>176</sup> Unsurprisingly, the EAGCP Report advocates a rule of reason approach to Art.102 as opposed to a *per se* approach. ‘An economics-based approach will naturally lend itself to a “rule of reason” approach to competition policy, since careful consideration of the specifics of each case is needed, and this is likely to be especially difficult under “*per se*” rules’ (para.3).

<sup>177</sup> ‘[A] lowering of consumer welfare provides evidence of competitive harm’ (para.8).

require a separate step for determining dominant position; a consistent and verifiable account of significant competitive harm is itself evidence of dominance (para.14).

All in all, the EAGCP Report was issued during the early years of the modernisation process and can be regarded as the first concrete call for a movement towards an effects-based approach, albeit non-binding on the Commission. The Report seems to have placed the consumer welfare objective at the forefront of the economic freedom objective in the enforcement of Art.102 and insists that formalism should be replaced with an evaluation of effects based on sound economics. A strong commitment to an effects-based approach, the emphasis placed on consumer welfare and the recognition of the fact that unilateral conduct can both create efficiencies and generate anti-competitive effects at the same time are the highlights of the Report. Mostly because it was prepared by a group of economists commissioned by the Chief Economist of the DG Comp and it departed from some traditional legal concepts in the enforcement of Art.102, in terms of the rigour of the economic analysis, the EAGCP Report was more advanced in contrast to both the Discussion Paper and the Guidance.

### **1.3.3. Discussion Paper on the Application of Art.82 EC to Exclusionary Abuses**

The Discussion Paper is the first substantive product of the modernisation that was issued in December 2005, a few months after the EAGCP Report. Like the EAGCP Report, the Discussion Paper suggests an effects-based approach to Art.102 and aims to improve, if not to reform, some of the former formalistic elements in the enforcement of Art.102. Having no enforcement status, it ‘draws and elaborates on the Commission’s evolving experience’ with the application of Art.102 (para.5). The Discussion Paper outlines an analytical framework for assessing abusive conduct under Art.102, but limits itself to exclusionary abuses. It begins by examining the market definition and dominance in Art.102 cases (paras.11-50), proceeds with the articulation of the framework for the analysis of exclusionary abuses (paras.51-92) and finally analyses some specific types of potentially abusive conduct in more detail (paras.93-242).

Under the framework of the analysis of exclusionary abuses, the Discussion Paper begins by explicitly stating that ‘[t]he objective of Article [102] is the protection of

competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources’ (para.4). Therefore, the Discussion Paper announces from the outset that it interprets abusive conduct in the light of the consumer welfare objective, instead of the economic freedom objective. In parallel to this, it maintains that in applying Art.102, the Commission will adopt ‘an approach which is based on the likely effects on the market’ (para.4) by ‘taking into account the particular facts and circumstances of each case’ (para.2). The Discussion Paper thus opts for an effects-based approach and disregards the form-based approach into abusive conduct.

Interestingly, the Discussion Paper lays down a definition of exclusionary abuses, something that is lacking both in the EAGCP Report, as well as in the Guidance. Accordingly, exclusionary abuses are practices of dominant undertakings which ‘are likely to have a foreclosure effect on the market, i.e. which are likely to completely or partially deny profitable expansion in or access to a market to actual or potential competitors and which ultimately harm consumers’ (para.1). The Commission takes this further in the later parts and states that Art.102 prohibits ‘exclusionary conduct which produces actual or likely anticompetitive effects in the market and which can harm consumers in a direct or indirect way’ (para.55). This definition is different from the definition originally set out by the CJEU in *Hoffmann La Roche* which was concerned with, or at least mentioned, effects of conduct on the market, but not on consumers.

Taking into account the effects of conduct rather than its form, the definition is centred on the competitive harm caused by exclusionary conduct, which involves *both* harm to competition and harm to consumers. Accordingly, conduct amounts to an abuse if it generates actual or likely anti-competitive effects in the market *and* causes direct or indirect consumer harm. This implies that harm to competition is not one and the same thing as harm to consumers in that both should be proved separately. This seems to be the methodological choice of the Discussion Paper; the EAGCP Report considers the harm to consumers as the only competitive harm, without a separate or additional requirement to prove harm to competition. Separate proof of consumer harm can be explained by the Commission’s willingness with the modernisation not to infer consumer harm from harm to competition or from the mere presence of a dominant position.

In terms of anti-competitive effects, the Discussion Paper states that ‘a likely market distorting foreclosure effect must be established’ (para.58). The Commission does not refrain from defining what is actually meant by such foreclosure and states that this occurs when ‘actual or potential competitors are completely or partially denied profitable access to a market’ (para.58). The Commission seems to have made a distinction between (lawful) foreclosure and (unlawful) “market distorting foreclosure” which ‘likely hinders the maintenance of the degree of competition still existing in the market or the growth of that competition and thus have as a likely effect that prices will increase or remain at a supra-competitive level’ (para.58). The recognition of such distinction suggests that mere harm to competitors will no longer automatically translate into harm to competition in the enforcement of Art.102.

The real emphasis of the Discussion Paper seems to be, however, on the harm to competition limb of the framework, since it hardly seeks proof of harm to consumers.<sup>178</sup> The Discussion Paper seems to infer consumer harm from the abusive conduct itself; it is primarily concerned with how conduct leads to foreclosure of the market, but is silent on how such foreclosure gives rise to consumer harm. In the definition of “market distorting foreclosure”, the Commission assumes that such foreclosure likely generates effects on the market *and thus* has a likely effect on consumer welfare. This contradicts with the earlier statements according to which harm to competition and harm to consumers should be separately proved, meaning that consumer harm should not be simply assumed from harm to competition. In this respect, the Discussion Paper rather fails to address the very reason of its existence, which is to seek proof of consumer harm caused by abusive conduct instead of a formalistic approach to the form of conduct.

In addition to the general framework of abusive conduct, the Discussion Paper contains separate and more detailed analyses for “the most common abuses”. These include “predatory pricing” (paras.93-133), “single branding and rebates” (paras.134-176), “tying and bundling” (paras.177-206) and “refusal to supply” (paras.207-242). For each of those examples; the Discussion Paper, like the EAGCP Report, tends to first state that they are

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<sup>178</sup> See Bishop, S. and Marsden, P. (2006) ‘The Article 82 Discussion Paper: A Missed Opportunity’, *European Competition Journal*, 2(1), p.5 ([T]he Discussion Paper only pays a lip-service to the need to demonstrate harm to competition.’).

‘common’ or ‘normal’ practices that ‘often have no anti-competitive effects’ and/or ‘benefit consumers’, but later discusses the possible situations in which they may generate anti-competitive effects on the market and on consumers. These examples are presented as potentially abusive practices based on the Commission’s past experience with Art.102; however, the recognition of the situations where they play efficiency-enhancing roles is in line with the modernisation.

To sum up, the Discussion Paper is the first substantive product of the modernisation. In fact, it was intended to form the basis of possible Guidelines on the enforcement of Art.102 in the later stages of the modernisation process. It must be because of this reason that, despite having no enforcement status, it has been extensively analysed in the literature and ambitiously discussed by academics and practitioners in numerous conferences. The Discussion Paper mostly remains loyal to the existing case law on market definition and determination of dominant position, but includes a lower level of economic arguments than originally advocated by the EAGCP Report. The focus on the analysis of the effects of conduct, several references to consumer welfare, a lack of reference to the special responsibility and extensive analysis of specific types of potentially abusive conduct are the contributions of the Discussion Paper to the modernisation of Art.102.

## **Conclusion**

Taking the view that understanding the Guidance lies beneath understanding a priori the modernisation of Art.102, Chapter 1 introduced the modernisation of Art.102. In this Chapter, the analytical and theoretical framework of Art.102 were analysed in Section 1.1, the reasons as to why the approach of the Commission and the EU Courts to Art.102 before the modernisation gave rise to heavy criticisms in the literature and paved the way for modernisation were discussed in Section 1.2 and finally the stages of the modernisation were explained in Section 1.3. Section 1.1 observed that there was a need for at least guidance, if not modernisation, on the enforcement of Art.102, because of the fact that the text of the Article was silent on the meaning of abuse and on the objective(s) of the Article, the definition of abuse by the CJEU was unsatisfactory and provided no methodology for identifying its scope, distinguishing “competition on the merits” from abusive conduct was challenging and there was a lack of coherent analytical approach to the Article in the case

law. Section 1.2 observed that mainly because of the old case law on Art.102 which has been criticised for being formalistic and lacking economic arguments or efficiency considerations, the Commission engaged in the modernisation of Art.102 with a view to bringing the Article into line with the modern economic thinking on unilateral conduct. Finally, Section 1.3 observed that the modernisation of Art.102 began in 2003 and started within the DG Comp, and the earlier products of the modernisation appeared only in 2005 once the reform in the area of merger control was completed.



## **CHAPTER 2 – THE EFFECT OF THE MODERNISATION PROCESS ON THE COMMISSION’S APPROACH TO ART.102**

### **Introduction**

Chapter 2 addresses the research question as to what changes have occurred in the Commission’s approach towards the interpretation of abuse of a dominant position with the modernisation of Art.102. This Chapter explores the general outcome of the modernisation of Art.102 and sheds light on the Commission’s new reading of Art.102. Chapter 1 showed that mainly because of the past decisions of the Commission and judgments of the EU Courts on Art.102 which have been criticised for being formalistic and lacking economic arguments or efficiency considerations, the Commission engaged in the modernisation of Art.102 with a view to bringing the Article into line with the modern economic thinking on unilateral conduct. Built upon the findings of Chapter 1, Chapter 2 furthers the discussion and aims to analyse the changes in the Commission’s substantive assessment of abuse of a dominant position in the backdrop of the modernisation process.

Chapter 2 identifies three fundamental changes in the Commission’s substantive assessment under Art.102 and analyses each change in a different section. The Chapter is therefore divided into three sections: Section 2.1 addresses the shift from special responsibility of dominant firms towards the concept of efficiency. This Section begins by exploring the origin of special responsibility which has been long reiterated in case law. It proceeds with a directly related issue which concerns whether competition should be viewed as a process or an outcome as this differs between the economic freedom and the consumer welfare objectives. Lastly, it examines the rise of efficiency in the assessment of abusive conduct. Section 2.1 observes that the modernisation of Art.102 is instrumental in the shift towards efficiency and since efficiency has been brought to the fore, special responsibility seems to be no longer necessary, if not contradictory, in the enforcement of Art.102 and this eventually results in competition to be viewed as an outcome.

Section 2.2 analyses another change in the Commission’s substantive assessment, namely the shift from a form-based approach towards an effects-based approach. This Section first introduces the traditional form-based approach under Art.102 by showing

some striking examples from case law, continues with the description of the effects-based approach and the advantages it offers, as well as the drawbacks it may entail, and finally touches upon the increasing use of economics in the assessment of abusive conduct which has triggered the shift towards the effects-based approach. Section 2.2 observes that the modernisation of Art.102 has given a fresh impetus to the use of economic analysis in the assessment of abusive conduct and the traditional form-based approach, which is no longer regarded as an appropriate approach, has been replaced with the effects-based approach, which is the result of advances in economic thinking in the area of unilateral conduct.

Section 2.3 deals with the last fundamental change in the Commission's substantive assessment, namely the shift from harm to competitors towards consumer harm. This Section first provides a discussion of the standard of harm under Art.102 which has a bearing on how abuse is defined despite not being articulated in the text of the Article. It proceeds with the harm to competition versus harm to competitors dilemma which caused a great deal of controversy before the modernisation. Lastly, it sheds light on the growing concern for consumer harm with the modernisation. Section 2.3 observes that the modernisation has placed a strong emphasis on the proof of consumer harm as part of the assessment of abusive conduct under Art.102, and while there are still doubts as to whether harm to competition is one and the same thing as consumer harm, the use of harm to competitors as shortcut to prove harm to competition has lost ground.

## **2.1. From Special Responsibility of Dominant Firms to Efficiency**

### **2.1.1. The Origin of Special Responsibility**

As discussed in Chapter 1, the enforcement of Art.102 has been heavily influenced by the Ordoliberal philosophy. In other words, the key policy that has underpinned the EU's regulation of dominant firms is to protect the economic freedom of other market participants.<sup>1</sup> Under the economic freedom objective, a "special responsibility" seems to have been attributed to dominant firms, though the text of Art.102 does not refer to such concept. The idea of special responsibility was first raised by the CJEU in *Michelin I* where the Court held that '[a] finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a

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<sup>1</sup> Monti, G. (2007) *EC Competition Law*, CUP, United Kingdom, p.211.

dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.’<sup>2</sup>

Here the CJEU emphasised, which has been long reiterated in the case law since then, that holding a dominant position is not in itself contrary to Art.102, but the undertaking which holds a dominant position on the relevant market is under an obligation to refrain from carrying out abusive conduct on account of its “special responsibility”. This term was elucidated by the GCEU: ‘[S]pecial responsibility means only that a dominant undertaking may be prohibited from conduct which is legitimate where it is carried out by non-dominant undertakings.’<sup>3</sup> However, this statement is not very helpful in assessing what type of substantive assessment is needed to rule conduct as an abuse. The boundaries of special responsibility were therefore not drawn very clearly by the Court.

In a narrow sense, the idea of special responsibility can be interpreted as saying no more than that Art.102 imposes obligations on dominant firms which are not imposed on non-dominant firms; whereas a wider interpretation would suggest that a dominant firm must refrain from any action which would increase its market power and harm competitors, even where the conduct is efficiency-based.<sup>4</sup> The origin of this doctrine can be traced back to Ordoliberalism: The Ordoliberal approach presumes that dominant firms are capable of altering the competitive structure of the market and therefore they must bear a “special responsibility” not to harm that structure through their abusive conduct. In other words, a dominant firm has a special responsibility because its conduct bears an inherent risk for the market, competitors, customers and ultimately consumers, since its impact and incidence determine ‘the rules of the game’.<sup>5</sup>

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<sup>2</sup> *Michelin I*, para.57. Since *Michelin I*, the special responsibility of a dominant firm has been well documented in the case law. See Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755, para.114; Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969, para.112; Case T-191/98 *Atlantic Container Line AB and Others v Commission* [2003] ECR II-3275, para.1124; Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, para.242; Case T-321/05 *AstraZeneca v Commission* [2010] ECR II-2805, para.671.

<sup>3</sup> Case T-191/98 *Atlantic Container Line AB and Others v Commission* [2003] ECR II-3275, para.1460.

<sup>4</sup> Ahlborn, C. and Padilla, J. (2008) “From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law”, in Ehlermann, C. and Marquis, M. (eds.), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, Hart Publishing, Great Britain, p.71-72.

<sup>5</sup> Mertikopoulou, V. (2007) ‘DG Competition’s Discussion Paper on the Application of Article 82 of the EC Treaty to Exclusionary Abuses: The Proposed Economic Reform from a Legal Point of View’, *European Competition Law Review*, 28(4), p.250.

The idea of attributing a special responsibility to dominant firms depends very much on how a dominant position is perceived. Under the economic freedom objective, the perception is that dominance itself signifies a state of poor competition.<sup>6</sup> Because of dominance, the impact of the dominant firm's conduct both on the remaining competition in the market and on consumers is exponentially greater.<sup>7</sup> For that reason, if dominance already weakens the state of competition prevailing in the market, then there is no real need of analysing the effects of an allegedly abusive practice in detail.<sup>8</sup> Thus the *raison d'être* of imposing such responsibility on dominant firms seems to bypass often complex assessment of effects of conduct on the market and/or on consumers once a dominant position is determined. As one commentator rightly observes:

‘In fact, the whole policy rationale underlying the European abuse of dominance (if not the entire European antitrust law) reverts to the understanding that certain conduct whose intrinsic character is difficult to assess may be particularly detrimental if put into practice by a stronger firm or by two or more undertakings jointly. The rationale for this is the acknowledgment that if a certain conduct is adopted by a firm who holds a position of substantial economic and commercial strength on the market, such conduct risks disrupting competition because the effect it is able to produce in the market is directly proportioned to the strength of the undertaking. With specific regard to Article [102], these ideas have led EU courts to determine the “special responsibility” doctrine...’<sup>9</sup>

The close link of this doctrine with the economic freedom objective may lead to the questioning of its existence once the focus of the assessment of abusive conduct under Art.102 shifts towards the analysis of effects of conduct on consumer welfare in line with the consumer welfare objective. This doctrine seems to attest the priority of structure of the market over performance of market participants.<sup>10</sup> If priority is given to the structure of the market and competition is valued as a process rather than an outcome, there will be no room for the consideration of efficiencies that might be generated by the conduct and the market will always be better-off with more competitors. Any special responsibility will

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<sup>6</sup> *ibid* at p.243.

<sup>7</sup> *ibid*.

<sup>8</sup> See Allendesalazar, R. (2008) “Can We Finally Say Farewell to the “Special Responsibility” of Dominant Companies?”, in Ehlermann, C. and Marquis, M. (eds.), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, Hart Publishing, Great Britain, p.323 (‘The consequence of such an unrestrained application of the concept of special responsibility is that, ultimately, proof of dominance is almost sufficient to establish an abuse.’).

<sup>9</sup> Arezzo, E. (2008) “Is There a Role for Market Definition and Dominance in an Effects-based Approach?”, in Mackenrodt, M. O., Gallego, B. C. and Enchelmaier, S. (eds.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, Springer, Germany, p.42.

<sup>10</sup> Riziotis, D. (2008) “Efficiency Defence in Article 82 EC”, in Mackenrodt, M. O., Gallego, B. C. and Enchelmaier, S. (eds.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, Springer, Germany, p.96.

then be irrelevant to the determination of liability, if a competition authority or a court asks the correct question as to whether the conduct has exclusionary effects on the market.<sup>11</sup>

In line with the essence of the modernisation, the Discussion Paper does not attribute any special responsibility to dominant undertakings and makes no reference to such throughout the document. By contrast, the Guidance articulates this from the outset, in the first paragraph.<sup>12</sup> In general, the Guidance did not go as far as the Discussion Paper in terms of the Commission's commitment to consumer welfare and also refers on many points to concepts from the economic freedom objective, special responsibility being only one of them.<sup>13</sup> Attributing a special responsibility to dominant firms is not in line with the effects-based approach and actually causes an unnecessary inconsistency in a consumer welfare-oriented document like the Guidance. Nevertheless, this is justifiable considering the fact that the Commission could not contradict the judgments of the EU Courts, where this doctrine is widely established, through the use of a soft law instrument.<sup>14</sup>

All in all, special responsibility is the last bastion of an obsolete approach which should now be jettisoned in favour of the modernisation of Art.102.<sup>15</sup> To date, the Commission and the EU Courts have relied on the doctrine of special responsibility under the traditional form-based approach to Art.102 to sanction perfectly sound commercial practices that are otherwise considered pro-competitive, without having to prove the anti-competitive effects of such practices.<sup>16</sup> With the modernisation, this concept seems to be no longer necessary, if not contradictory, in the enforcement of Art.102 through the lens of the

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<sup>11</sup> McMahon, K. (2009) "A Reformed Approach to Article 82 and the Special Responsibility Not to Distort Competition", in Ezrachi, A. (ed.), *Article 82 EC: Reflections on Its Recent Evolution*, Hart Publishing, United Kingdom, p.125.

<sup>12</sup> '...the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.' Guidance, para.1.

<sup>13</sup> Referring to the fact that the Discussion Paper omitted any reference to the special responsibility but the Guidance returned to this idea, Korah finds this "worrying" and argues that this may indicate that its inclusion came from "someone important", implying the Commission's Legal Service. The author contends that more than one drafter has contributed to the Guidance as there are many references to efficiency and consumer benefit, but equally there are important references to the special responsibility. Korah, V. (2011) "Guidance on the Commission's Enforcement Priorities in Applying Article 82 to Abusive Exclusionary Conduct by Dominant Undertakings: From Protecting Freedom to Enter a Market to an Efficient Allocation of Resources to Increase Consumer Welfare", in Pace, L. F. (ed.), *European Competition Law: The Impact of the Commission's Guidance on Article 102*, Edward Elgar Publishing, Great Britain, p.20-24.

<sup>14</sup> See *infra* "3.1.1. Guidance on Enforcement Priorities Rather than "Guidelines on Art.102".

<sup>15</sup> McMahon (2009), p.127.

<sup>16</sup> Allendesalazar (2008), p.321.

effects-based approach. In this respect, special responsibility is not mentioned in the Discussion Paper, and in the Guidance it seems to have practically lost its major traditional role it has played in the case law.

### **2.1.2. Competition as a Process vs. Competition as an Outcome**

A directly related issue to the shift from the special responsibility towards efficiency is the perception of “competition” which seems to differ between the economic freedom and the consumer welfare objectives. The modernisation of Art.102 has raised the important question among scholars as to whether competition is a “process of rivalry” between undertakings in a given market or an “outcome” which is supposed to bring benefits to consumers. The answer is hugely important as it will determine the approach towards abuse: If competition is a process, or an “institution”, it will have an intrinsic value which will form the basis of its protection. In this case, rivalry among firms will be the focus of Art.102. On the other hand, if competition is an outcome, or an “end result”, such as low prices or better products, it will be protected not for its own sake, but for the benefits that may be derived by consumers. In this case, the protection of consumer welfare will be the focus of Art.102.

Even decades before the modernisation, the role attributed to competition differed remarkably between the schools of thought in competition law and economics in the US. The Harvard School, under its famous “Structure-Conduct-Performance” (SCP) paradigm,<sup>17</sup> postulates that the structure of a market determines the firms’ conduct, which in turn influences the performance of that market. Taking a structuralist approach, the Harvard School views competition as a “process”. If the market structure is that of a monopoly, then the market will be conducive to monopolistic conduct, but if it is pluralistic, meaning that there are a certain amount of competitors in the market, then the conduct will be less likely to be monopolistic. It argues that a high level of concentration in a market will facilitate the exercise of monopoly power, whereas the market will be more

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<sup>17</sup> The SCP paradigm became dominant in the 1930s, 1940s and 1950s, and was associated with Harvard economists such as Joe Bain, Edward Mason and Carl Kaysen. See generally Gormsen, L. L. (2010a) *A Principled Approach to Abuse of Dominance in European Competition Law*, CUP, United Kingdom, p.30.

competitive with a low level of concentration.<sup>18</sup> Rivalry is thus seen as an essential part of competition.

The Harvard's School view of competition law and economics was "replaced" by the Chicago School's line of thinking which questioned some of the principles previously established by the Harvard School. The Chicago School<sup>19</sup> rejects the SCP paradigm and argues that the assessment of abusive conduct should be based on its effects on competition or on efficiency. It questions the idea of competition being a process and finds it inappropriate to presume competitive harm from high levels of concentration in the market. Rather, competition is regarded as an outcome, which either brings benefits to or harms consumers, as the case with price increases, output limitations and so on. The conduct is not considered exclusionary when it benefits consumers despite reducing the pluralistic structure of the market. Protecting the structure of the market in itself is inconsistent with the efficiency-oriented Chicago School, which believes in the goal of efficiency.<sup>20</sup>

Turning back to the EU, the economic freedom objective is motivated primarily by a concern for the structure of the market and competition as a process. Ordoliberalism treats competition as an institution, and the paramount concern is harm to the structure of the market, evidenced through the relative position of rivals.<sup>21</sup> Position of rivals is determinative in this objective: If competition is understood as a process, then the number of competitors in a given market will show the sign of competition in that market. Rivalry matters so much that a particular market structure should be guaranteed, which most usually translates as a certain number of competitors.<sup>22</sup> The pluralistic structure of the

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<sup>18</sup> However, economic theory and practical experience over the past 30 to 40 years have shown that competitive dynamics can function well even if a market has some very large players who can improve competitive dynamics. Niels, G. and Jenkins, H. (2005) 'Reform of Article 82: Where the Link between Dominance and Effects Breaks Down', *European Competition Law Review*, 26(11), p.605.

<sup>19</sup> The Chicago School supplanted the reigning antitrust orthodoxy in an antitrust revolution beginning in the mid-1970s. The triumph of the Chicago School was a revolution in ideas, developed and spread by a collection of economists and lawyers, associated with the University of Chicago, including Robert Bork, Frank Easterbrook, Richard Posner and George Stigler. See generally Baker, J. B. (2002) "A Preface to Post-Chicago Antitrust", in Cucinotta, A., Pardolesi, R. and Van den Bergh, R. (eds.), *Post-Chicago Developments in Antitrust Law*, Edward Elgar Publishing, Great Britain, p.65.

<sup>20</sup> See *infra* "2.1.3. The Way to the Concept of Efficiency".

<sup>21</sup> Marsden, P. (2010a) "Exclusionary Abuses and the Justice of 'Competition on the Merits'", in Lianos, I. and Kokkoris, I. (eds.), *The Reform of EC Competition Law: New Challenges*, Kluwer Law International, Great Britain, p.415.

<sup>22</sup> *ibid* at p.414.

market is assumed to turn into more competition in the market, at least in the short run. Accordingly, the higher the number of competitors in a market, the more competitive the market becomes.

Proponents of the consumer welfare objective view competition as an outcome, providing consumers with a variety of cheaper and better products. In line with this line of thought, what matters are the outcomes for consumers that competition in a particular market delivers, not the particular form that the competitive process takes.<sup>23</sup> Whilst the competitive process is important as an instrument, its protection is not an aim in itself; the ultimate aim is the protection of consumer welfare, as an outcome of the competitive process.<sup>24</sup> When competition is understood as an outcome, the number of competitors in the market will not be a necessary indication of competition. Reduction in the number of players in the market is not deemed as anti-competitive in itself; the observation that the absence of a sufficient number of competitors can lead to consumer harm is now ‘trite’.<sup>25</sup>

It has been argued that in line with the idea of competition being a process, the Commission and the EU Courts have firmly believed that there is no effective competition where there are no competitors.<sup>26</sup> In their decisions and judgments thus far, they seemed to have been inclined to protect competition in the market as a process, through protecting the structure of the market or structure of competition.<sup>27</sup> In this respect, in her oft-quoted opinion in *British Airways*, Advocate General (AG) Kokott regarded competition as an “institution”. When British Airways raised the objection that the Commission had to prove that the allegedly abusive conduct had actual effects on competition, AG Kokott opined that:

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<sup>23</sup> Bishop, S. and Walker, M. (2010) *The Economics of EC Competition Law: Concepts, Application and Measurement*, 3<sup>rd</sup> Edition, Sweet & Maxwell, Great Britain, p.20-21.

<sup>24</sup> Lowe, P. (2007) Consumer Welfare and Efficiency - New Guiding Principles of Competition Policy?, Speech at 13<sup>th</sup> International Conference on Competition and 14<sup>th</sup> European Competition Day, Munich 27 March 2007, <[http://ec.europa.eu/competition/speeches/text/sp2007\\_02\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2007_02_en.pdf)> [accessed 30/09/2014], p.9.

<sup>25</sup> O'Donoghue, R. and Padilla, J. (2013) *The Law and Economics of Article 102 TFEU*, 2<sup>nd</sup> Edition, Hart Publishing, Great Britain, p.274.

<sup>26</sup> Ahlborn and Padilla (2008), p.59.

<sup>27</sup> ‘[T]he concept of an abuse within the meaning of that article is an objective one, implying inter alia behaviour which is prejudicial to the *structure of competition*.’ Case T-11/96 *ITT/Promedia v Commission* [1998] ECR II-2937, para.44 (emphasis added). See also Odudu, O. (2006) *The Boundaries of EC Competition Law: The Scope of Article 81 EC*, OUP, Great Britain, p.15 as the author argues that competition as a process has heavily influenced the EU’s perception of competition law.



‘Article [102]... is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution), which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared.’<sup>28</sup>

As can be seen, Art.102 has been thought by the AG Kokott to protect competition as a process or an institution. Clearly, competition is not protected as an outcome which benefits consumers. Consumer interests are almost considered as a by-product while the real focus of the Art.102 is to protect the process of rivalry in the market, or competition as such. Rivalry is assumed to bring benefits and by protecting rivalry, consumers are thus indirectly protected. Evident from this Opinion, competition is thought to be weakened by the mere presence of a dominant undertaking, which is a clear indication of the economic freedom objective. This Opinion was delivered in 2007 before the Guidance, while the modernisation was still underway. Some judgments after the Guidance still show the emphasis on the protection of competition, sometimes without competition being referred to as an institution, but apparently with more consideration of the position of consumers.<sup>29</sup>

To sum up, the answer to the question as to whether competition is a process of rivalry or an outcome is not theoretical; on the contrary, it will determine the approach towards abusive conduct under Art.102. Traditionally, the Commission and the EU Courts have regarded competition as a process and intervened when the allegedly abusive conduct in question threatened the structure of the market in the absence of any detailed assessment on possible benefits of the conduct on consumer welfare. A shift from the doctrine of special responsibility towards the concept of efficiency requires, and will eventually result in, competition to be viewed as an “outcome”. The Guidance now states that the Commission will direct its enforcement to ensuring that ‘consumers benefit from the

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<sup>28</sup> Opinion of AG Kokott in Case C-95/04 *British Airways v Commission* [2007] ECR I-2331, para.68. (emphasis original) (citations omitted). See Case C-501/06 *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291, para.63 for a similar line of thought.

<sup>29</sup> In *TeliaSonera*, AG Mazák held the view that ‘[t]he primary purpose of Article 102 TFEU is to protect competition and to safeguard the interests of consumers rather than to protect the position of particular competitors.’ Opinion of AG Mazák in C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-0527, para.30. The view taken by AG Mazák in this judgment seems to be more consumer welfare-friendly and takes into account the interests of consumers not as an indirect outcome in contrast to AG Kokott’s Opinion in *British Airways*.

efficiency and productivity *which result from* effective competition between undertakings'.<sup>30</sup>

### 2.1.3. The Way to the Concept of Efficiency

The rise of the concept of efficiency in the assessment of abusive conduct first took place in the US. Starting from 1980s, the US courts have relied almost exclusively on their assessment of whether conduct reduces efficiency and the analysis of claims of exclusion focused overwhelmingly on efficiency consequences.<sup>31</sup> The US Supreme Court's reasoning in *Aspen* unequivocally put the emphasis on this concept. The Court held that '[i]f a firm has been "attempting to exclude rivals *on some basis other than efficiency*," it is fair to characterize its behavior as predatory.'<sup>32</sup> Accordingly, when exclusion is the result of the firm's efficiency, the allegedly abusive conduct constitutes lawful pro-competitive conduct. Equally, when the conduct is '*not motivated by efficiency concerns*' or '*not related to any apparent efficiency*' or the dominant firm in question fails to '*offer any efficiency justification*', then it will amount to an abuse.<sup>33</sup> Also, *Microsoft* suggests that pro-competitive conduct involves '*greater efficiency*', whereas abusive conduct involves no or less efficiency, but the decisive factor is efficiency in any case.<sup>34</sup>

The concept of efficiency has almost become a 'basic antitrust principle' in the US.<sup>35</sup> By contrast, both the Commission and the EU Courts have historically taken a very sceptical view in response to efficiency arguments.<sup>36</sup> This is due to the predominantly pursued objective of economic freedom which regards efficiency as a by-product rather than an aim in itself. The modernisation of Art.102, however, appears to have brought

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<sup>30</sup> Guidance, para.5 (emphasis added).

<sup>31</sup> Kovacic, W. E. (2007) 'The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix', *Columbia Business Law Review*, 1(1), p.19-20.

<sup>32</sup> *Aspen Skiing Co. v Aspen Highlands Skiing Corp.*, 472 US 585 (1985), para.605 (emphasis added) (citations omitted).

<sup>33</sup> *ibid.*

<sup>34</sup> In *Microsoft*, while discussing the burden of proof in the case at hand, the Court of Appeals held that if the monopolist asserts that 'its conduct is indeed a form of competition on the merits because it involves, for example, *greater efficiency* or enhanced consumer appeal-then the burden shifts back to the plaintiff to rebut that claim.' *United States v Microsoft Corp.*, 253 F.3d 34, 346 (D.C. Cir. 2001), para.355 (emphasis added).

<sup>35</sup> Kirkwood, J. B. (2013) 'The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct', 81 *Fordham Law Review*, p.2432.

<sup>36</sup> Bellis, J. F. and Kasten, T. (2010) "Will Efficiencies Play an Increasingly Important Role in the Assessment of Conduct Under Article 102?", in Etro, F. and Kokkoris, I. (eds.), *Competition Law and the Enforcement of Article 102*, OUP, Great Britain, p.131.

efficiency to the fore in the assessment of abusive conduct. Even before the publication of the Discussion Paper, the former Competition Commissioner Kroes stated from the outset that the Commission ‘must find a way to include efficiencies in [its] analysis.’<sup>37</sup> Evidently, the modernisation process has been instrumental in the move towards efficiency in the EU, in spite of some references to this concept in some decisions and judgments before the modernisation process started.

Although efficiency was discussed in EU competition law before the modernisation, it was not at the centre of the assessment, at least not in the US sense of this concept. As early as 1985, the Commission in *AKZO* decided that ‘[t]he maintenance of a system of effective competition does however require that a small competitor be protected against behaviour by dominant undertakings designed to exclude it from the market *not by virtue of greater efficiency or superior performance* but by abuse of dominance.’<sup>38</sup> According to this finding, if conduct is not the result of ‘greater efficiency’, it should constitute an abuse. Similarly, in *Irish Sugar*, the GCEU held that in order for the protection of commercial position of a dominant firm to be lawful, it must be at the very least based on ‘*criteria of economic efficiency*’.<sup>39</sup> In the context of rebates, the GCEU explained that principally a dominant firm ‘can give discounts that relate to *efficiencies*, but cannot give discounts or incentives to encourage customer loyalty’.<sup>40</sup>

There has been an increasing trend among both American and European commentators in favour of efficiency. Hovenkamp argues that antitrust enforcement should be designed in such a way as to prohibit conduct ‘precisely to the point that it is *inefficient*, but to tolerate or encourage it when it is *efficient*.’<sup>41</sup> Posner puts forward that only when market power is used to ‘perpetuate a monopoly not supported by *superior efficiency*

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<sup>37</sup> Kroes, N. (2005) Preliminary Thoughts on Policy Review of Article 82, Speech at the Fordham Corporate Law Institute New York, 23 September 2005, <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/537&format=PDF&aged=1&language=EN&guiLanguage=en>> [accessed 30/09/2014], p.5.

<sup>38</sup> Case IV/30.698 *ECS/AKZO* [1985] OJ L 374/1, para.81 (emphasis added). See also Case IV/34.621, 35.059/F-3 *Irish Sugar plc* [1997] OJ L 258/1, para.134.

<sup>39</sup> Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969, para.189 (emphasis added).

<sup>40</sup> Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, para.262 (emphasis added). Here the GCEU implied that for the allegedly abusive conduct, efficiency is a justification in the absence of which it could be held as an abuse.

<sup>41</sup> Hovenkamp, H. (1985) ‘Antitrust Policy after Chicago’, 214 *Michigan Law Review*, p.229 (emphasis added).

should the law step in.’<sup>42</sup> Whish contends that ‘if a firm ends up as a monopolist simply by virtue of its *superior efficiency*, this should be applauded, or at very least not be condemned.’<sup>43</sup> Waelbroeck stresses that dominant firms are not prohibited to compete even aggressively ‘provided this is the result of this *greater efficiency*’.<sup>44</sup> Nazzini takes a further step and insists that the definition of abuse as laid down in *Hoffmann La Roche* ‘establishes the general principle that conduct is abusive when it restricts competition by means other than behaviour based on *efficiency*’.<sup>45</sup>

Efficiency analysis in competition law is scientific and well-grounded in economics. It is often used to indicate specific situations such as “productive efficiency”, “allocative efficiency” and “dynamic efficiency”.<sup>46</sup> In all of these situations, the underlying idea is the same: They indicate a situation where a dominant firm have achieved success (and excluded its competitors) through its “hard work” and by doing better than its competitors. The fact that competitors’ businesses have been impaired, their competitiveness have been reduced or they have been driven out of the market, all of which are a central concern for the economic freedom objective, is disregarded under the consumer welfare objective due to the countervailing efficiency of the dominant firm which has brought consumers desirable outcomes such as lower prices, new or improved products, high quality goods or services and so on. As can thus be seen, where the emphasis is put on efficiency, competition will be ipso facto regarded as an outcome.

To conclude, the concept of efficiency has gained greater prominence in the assessment of abusive conduct with the Chicago School which postulates that the objective of competition law should be efficiency and the maximisation of consumer welfare, and

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<sup>42</sup> Posner, R. (2001) *Antitrust Law*, 2<sup>nd</sup> Edition, University of Chicago Press, Chicago, p.196 (emphasis added).

<sup>43</sup> Whish, R. (2011) “National Competition Law Goals and the Commission’s Guidance on Article 82EC: The UK Experience”, in Pace, L. F. (ed.), *European Competition Law: The Impact of the Commission’s Guidance on Article 102*, Edward Elgar Publishing, Great Britain, p.154 (emphasis added).

<sup>44</sup> Waelbroeck, D. (2010) “The Assessment of Efficiencies under Article 102 and the Commission’s Guidance Paper”, in Etro, F. and Kokkoris, I. (eds.), *Competition Law and the Enforcement of Article 102*, OUP, Great Britain, p.118 (emphasis added).

<sup>45</sup> Nazzini, R. (2011) *The Foundations of European Union Competition Law: The Objective and Principles of Article 102*, OUP, United Kingdom, p.171 (emphasis added).

<sup>46</sup> For the definition of those different types of efficiencies, see Brodley, J. F. (1987) ‘The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress’, 62 *New York University Law Review*, p.1020-1053.

any other objective is therefore irrelevant. While some references were made to this concept in the case law of the EU Courts albeit not in the US sense of this concept, the modernisation of Art.102 appears to be instrumental in the shift towards this concept from the economic freedom objective. The adoption of efficiency in the EU normally implies a rejection of the economic freedom objective and its doctrine of special responsibility, which has been gaining ground among a vast majority of European commentators.<sup>47</sup> Throughout the Guidance, the Commission now makes numerous references to efficiency and efficiency-related arguments.<sup>48</sup>

## **2.2. From a Form-based Approach to an Effects-based Approach**

### **2.2.1. The Form-based Approach: A Doctrine that Has Been Much Relied Upon**

As a consequence of the shift towards the adoption of the consumer welfare objective with a strong reliance on the concept of efficiency, one of the fundamental changes in the Commission's approach to abusive conduct under Art.102 with the modernisation is the embracement of the effects-based approach at the expense of the form-based approach. The form-based approach has been often relied upon in the Commission's decisional practice and in many judgments of the EU Courts. The Commission and the EU Courts have been criticised for placing too much emphasis on the form of conduct and too little emphasis on its effects on the market and consumers. By the same token, Art.102 has been criticised for being formalistic and structuralist. The discussion and management of Art.102 cases are often organised by forms or categories of conduct.<sup>49</sup>

As the name implies, the form-based approach requires that the form of the conduct of a dominant firm is subject to the assessment of abuse of a dominant position instead of its effects on the market, on competition or on consumers. In line with this approach, once the conduct is determined and the firm is found to be dominant on the relevant market, the

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<sup>47</sup> Cf. Mestmäcker, one of the strong adherents to the Freiburg School, insists that efficiency does not define the right of undertakings to participate in commerce and competition is equal for dominant undertakings and their competitors, implying that exclusion of inefficient competitors from the market violates fundamental EU law rights. Mestmäcker, E. J. (2011) "The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008", in Pace, L. F. (ed.), *European Competition Law: The Impact of the Commission's Guidance on Article 102*, Edward Elgar Publishing, Great Britain, p.46.

<sup>48</sup> See Guidance, paras.5, 22, 23, 24, 25, 26, 27, 28, 30, 31, 41, 43, 59, 60, 62, 67, 74, 80, 83 and 90.

<sup>49</sup> EAGCP Report, para.5.

conduct is often found to be anti-competitive without actually proving whether it generates anti-competitive effects. Therefore all a competition authority or a court has to do is to rule the conduct as either abusive or lawful based on the category that the conduct is fit into.<sup>50</sup> This approach leads to allegedly anti-competitive practices being categorised under various headings, based on descriptions of behaviour that are likely to be prohibited regardless of the factual context or actual economic impact in any particular case.<sup>51</sup>

A form-based approach does not mean that effects of conduct are utterly disregarded; more exactly it *should* mean that forms of certain types of conduct are considered highly likely to generate anti-competitive effects from the outset. Therefore from the enforcer's point of view, there will be no need to prove those effects in every case once the form is determined. Even under an effects-based approach, there may be no need to fully examine detrimental effects on consumers if economic theory demonstrates that consumers are almost always harmed from certain types of conduct.<sup>52</sup> This is mostly the case with price-fixing or market-sharing agreements among competitors, so called "object restrictions", under Art.101 TFEU. However, in the area of unilateral conduct, such a per se illegality for abuse of a dominant position under Art.102 will not normally be the right approach.<sup>53</sup>

Arguably, the form-based approach, as has been applied in the EU, has not served to this purpose. Under the influence of the economic freedom objective, the form-based approach resulted in certain types of conduct with exclusionary potential being condemned, not because they caused harm to consumers but because they excluded, or attempted to exclude, competitors from the relevant market. It has been argued that in general, the EU Courts were satisfied if the Commission showed the expected exclusionary effects of a given practice and as a result, practices with exclusionary potential were presumed to be abusive unless an objective justification for the practice in question could be put forward by

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<sup>50</sup> '[U]nder a form-based approach, it is enough to verify (i) that a firm is dominant and (ii) that a certain form of behaviour is practiced...' *ibid* at paras.12-13.

<sup>51</sup> CLF (2005) 'The Reform of Article 82: Recommendations on Key Policy Objectives', *European Competition Journal*, 1(1), p.181.

<sup>52</sup> Under these circumstances, it is generally accepted that it will make sense to prohibit the whole category even with knowledge that this will condemn some beneficial instances. Easterbrook, F. (1984) 'The Limits of Antitrust', 63 *Texas Law Review*, p.10.

<sup>53</sup> On the role of per se illegality in Art.102 cases, see *infra* "2.2.3. The Increasing Use of Economics in Assessing Abuse of a Dominant Position".

the dominant firm engaging in that practice.<sup>54</sup> As discussed in Chapter 1, many of the past judgments of the EU Courts articulated a high level of formalism whereby the EU Courts reiterated that anti-competitive effects were not necessary for a finding of abuse.

Also commentators have noted that a formalistic approach towards certain types of conduct, in particular loyalty rebates and exclusive dealing, was adopted in the case law. Spinks argues that the lawfulness of exclusive dealing depended first on whether the supplier is or is not in a dominant position, and if this condition is fulfilled, then exclusive dealing is generally prohibited by Art.102 where it is capable of affecting trade between the MSs.<sup>55</sup> Lugard similarly contends that the treatment of exclusive dealing is traditionally marked by a stronger belief that exclusive dealing by a dominant firm is harmful and should be treated as unlawful under Art.102.<sup>56</sup> Waelbroeck observes that there is a general tendency in the EU to simply presume systematic anti-competitive effects in the case of any rebate scheme of a dominant firm and to underestimate their pro-competitive effects.<sup>57</sup> Niels and Jenkins claim that the treatment of loyalty rebates illustrates the shortcomings of the form-based approach in EU competition law.<sup>58</sup> Lastly, Zenger states that the treatment of loyalty rebates by the EU Courts ‘is bound to punish successful innovators and to protect less effective rivals from the inconveniences of the competitive process.’<sup>59</sup>

In fact, the form-based approach is not entirely meritless; it has some redeeming features. The form-based approach may provide greater legal certainty and faster

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<sup>54</sup> Blanco, L. O. and Colomo, P. I. (2011) “Evolving Priorities and Rising Standards: Spanish Law on Abuse of Market Power in the Light of the 2008 Guidance Paper on Article 82 EC”, in Pace, L. F. (ed.), *European Competition Law: The Impact of the Commission’s Guidance on Article 102*, Edward Elgar Publishing, Great Britain, p.75.

<sup>55</sup> Spinks, S. O. (2000) ‘Exclusive Dealing, Discrimination and Discounts under EC Competition Law’, 67 *Antitrust Law Journal*, p.641-670.

<sup>56</sup> Lugard, P. (2006) ‘Eternal Sunshine on a Spotless Policy? Exclusive Dealing under Article 82EC’, *European Competition Journal*, 2 (Special Issue), p.164.

<sup>57</sup> Waelbroeck, D. (2005) ‘Michelin II: A Per Se Rule Against Rebates by Dominant Companies?’, *Journal of Competition Law and Economics*, 1(1), p.151. Faella argues that the tendency to induce loyalty has been deemed as sufficient in case law to justify the prohibition of conduct on the ground that the special responsibility of dominant firms requires them not to make it more difficult for rivals to access the market. Faella, G. (2008) ‘The Antitrust Treatment of Loyalty Discounts and Rebates’, *Journal of Competition Law and Economics*, 4(2), p.384.

<sup>58</sup> Niels and Jenkins (2005), p.608.

<sup>59</sup> Zenger, H. (2012) ‘Loyalty Rebates and the Competitive Process’, *Journal of Competition Law and Economics*, 8(4), p.720.

resolutions than an effects-based approach.<sup>60</sup> It may provide guidance to dominant firms on the forms of conduct that are or could be prohibited. It has been argued that enforcers should endeavour to provide firms with clear signs of which kinds of conduct are likely to be legal and which kinds are likely to be condemned.<sup>61</sup> It is essential for companies to know firstly whether they are dominant and secondly what conduct they must avoid.<sup>62</sup> In addition, the form-based approach helps competition authorities to utilise their scarce resources more efficiently and reduce their enforcement costs, which may appear very appealing from enforcers' point of view.

On the other hand, the form-based approach can occasionally be rigid in that it might not be conducive to companies adopting optimally efficient business practices.<sup>63</sup> This in turn might discourage or chill pro-competitive conduct which would have otherwise benefitted consumers. With the adoption of a form-based approach, enforcers run the risk of forbidding courses of conduct that have no anti-competitive – or that wield pro-competitive – effects.<sup>64</sup> In addition to blocking 'benign' conduct, it can also allow detrimental conduct and thus end up with providing clarity at superficial level, rather than at fundamental level.<sup>65</sup> There is always a risk that a list of prohibited forms of conduct may constitute 'an uncomfortable "straight jacket" that would impede economic progress and development'.<sup>66</sup> Past experience has shown that the form-based approach generally fails to protect consumer interests.<sup>67</sup>

Consequently, the form-based approach to abusive conduct has been often relied upon in the Commission's decisional practice and in many judgments of the EU Courts. Under the influence of the economic freedom objective, the form-based approach resulted in some types of conduct with exclusionary potential, in particular loyalty rebates and exclusive dealing, being condemned in the absence of any harm to consumers. From an

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<sup>60</sup> OECD (2005) Competition on the Merits, OECD Policy Roundtables, DAF/COMP(2005)27, <<http://www.oecd.org/dataoecd/7/13/35911017.pdf>> [accessed 30/09/2014], p.9.

<sup>61</sup> Allendesalazar (2008), p.325.

<sup>62</sup> Goyder, J. and Albors-Llorens, A. (2009) *EC Competition Law*, 5<sup>th</sup> Edition, OUP, Great Britain, p.651.

<sup>63</sup> *ibid* at p.14.

<sup>64</sup> Petit, N. (2009) 'From Formalism to Effects? The Commission's Communication on Enforcement Priorities in Applying Article 82 EC', *World Competition*, 32(4), p.486.

<sup>65</sup> Vickers, J. (2005) 'Abuse of Market Power', *The Economic Journal*, 115(504), p.F260.

<sup>66</sup> EAGCP Report, para.16.

<sup>67</sup> Bishop, S. and Marsden, P. (2006) 'The Article 82 Discussion Paper: A Missed Opportunity', *European Competition Journal*, 2(1), p.1.



enforcer's point of view, it is true that the form-based approach is easily administrable; however, it no longer seems to be an appropriate approach, when one takes into account the risk that Art.102 might actually discourage competition on the part of dominant firms as a result of an overly-formalistic analysis of their conduct. With the modernisation of Art.102, the Commission has aimed to replace the form-based approach with more up-to-date effects-based approach, which will be discussed immediately below.

### **2.2.2. The Effects-based Approach: A Better but Complex Assessment**

In an attempt to counteract the harsh criticisms levelled against the Commission and the EU Courts for being formalistic in many of their decisions and judgments, the modernisation of Art.102 involves a shift from the doctrine of special responsibility, which is a product of the economic freedom objective, towards the concept of efficiency, which is at the heart of the consumer welfare objective. Following the adoption of efficiency, analysing the effects of conduct on the market and on consumers stands out as the fundamental part of the assessment of abusive conduct in Art.102 cases. Since efficiency requires the assessment of effects of conduct on consumers, which is not the focus of the economic freedom objective, it is understood that apparently the form-based approach fails to serve to this end and therefore the adoption of the effects-based approach has gained ground in the EU.

The effects-based approach to Art.102 implies that the assessment of each specific case is not undertaken on the basis of the form that a particular behaviour takes, but is based on the assessment of the anti-competitive effects generated as a result of the conduct. According to this approach, conduct should be condemned as abusive under Art.102 only where it could be demonstrated that it had, or was likely to have, a seriously anti-competitive effect on the market.<sup>68</sup> This approach has been widely advocated by the EAGCP Report which argues in favour of an effects-based approach to Art.102 and focuses on the examination of anti-competitive effects that harm consumers in each specific case.<sup>69</sup> The Report insists that formalism should be replaced with the assessment of effects, based on sound economics and grounded on facts.

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<sup>68</sup> Whish (2011), p.155.

<sup>69</sup> See *supra* "1.3.2. Report by the EAGCP: An Economic Approach to Art.82".

The effects-based approach serves two purposes: It guarantees that the statutory provisions do not unduly thwart pro-competitive practices on the part of dominant firms, as the case with the economic freedom approach, and in the same vein, anti-competitive practices do not outwit legal provisions.<sup>70</sup> This approach provides a more consistent treatment of abusive conduct, since the conduct is assessed in terms of its outcome and different practices which lead to the same result will therefore be subject to a comparable treatment.<sup>71</sup> By focusing on effects rather than forms of conduct, an economics-based approach makes it more difficult for dominant firms to circumvent competition rules by way of attempting to achieve the same end results through the use of different unilateral practices.<sup>72</sup> It would be highly problematic to simply define rules depending on the categorisation of conduct since a number of practices fit into multiple categories, which could lead to different outcomes depending on how they happened to be categorised.<sup>73</sup>

The trans-Atlantic divide is clearly visible in the context of the analysis of effects of abusive conduct. In the US, exclusionary effects have to be proved, not as a hypothesis nor as a logical possibility, but as a reasonable possibility.<sup>74</sup> It is accepted that ‘to be condemned as exclusionary, a monopolist’s act *must* have an “anticompetitive effect”’.<sup>75</sup> However, the same cannot be said for the EU. The concept of effects has given rise to some of the most contentious issues under Art.102; in particular whether it is necessary to examine anti-competitive effects in all cases, what the standard for anti-competitive effects is or should be, and how the presence or absence of such effects should be measured.<sup>76</sup> As discussed above, in general the EU Courts were satisfied if the Commission showed the expected exclusionary effects of conduct and as a result practices exclusionary potential were easily ruled as abusive.<sup>77</sup>

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<sup>70</sup> EAGCP Report, para.2.

<sup>71</sup> *ibid.*

<sup>72</sup> *ibid.*

<sup>73</sup> O’Donoghue and Padilla (2013), p.239.

<sup>74</sup> Heimler, A. (2005) ‘Pricing below Costs and Loyalty Discounts: Are They Restrictive and If So When’, *Competition Policy International*, No 2, p.149-172.

<sup>75</sup> *United States v Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), para.58 (emphasis added).

<sup>76</sup> O’Donoghue and Padilla (2013), p.262. The authors add that it is surprisingly unclear what types of anti-competitive effects are relevant under Article 102 TFEU and how they might be shown. *ibid.*

<sup>77</sup> Blanco and Colomo (2011), p.75. See also Heimler (2005), p.150 (‘What counts in the EU case law is the abstract possibility of excluding competitors...’).

The effects-based approach requires the clarification of two questions: On what or who and to what extent must effects be demonstrated? Effects can be generated on consumers, competition or competitors.<sup>78</sup> Adoption of the effects-based approach does not necessarily mean that effects should be generated on consumers. However, the effects-based approach is closely associated with the consumer welfare objective which is concerned with effects on consumers as part of the assessment. In some cases, a reference is made to “competition” in addition to consumers in order to show the subject on which effects should be demonstrated. Often the reference to “effects on competition” is made to distinguish it from “effects on competitors”, which is disregarded under the consumer welfare objective. Some allegedly effects-based cases before the modernisation indicate that the Commission did adopt an effects-based approach, but considered the effects on the structure of the market rather than on consumers.<sup>79</sup>

The extent to which effects must be demonstrated is another question raised after the adoption of the effects-based approach. It has been argued that an effect-based approach does not mean fully quantifying all the pro- and anti-competitive effects of the conduct in each case and then weighing these against each other, even though some economists may have created this impression.<sup>80</sup> The use of an effects-based approach does not imply that complex economic or econometric analyses will be necessary in every case, although they can, of course, be useful tools.<sup>81</sup> Implying that the standard of proof for effects that is sufficient to rule conduct as abusive need not to be high, the Commission stated that anti-competitive effects can be shown by carefully analysing the factual developments in the relevant markets and the ways in which the conduct is likely to affect the market.<sup>82</sup>

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<sup>78</sup> See *infra* “2.3.1. The Standard of Harm under Art.102”.

<sup>79</sup> For instance in *Microsoft*, the Commission held inter alia that ‘[a]s long as consumers “automatically” obtain WMP – even if for free – alternative suppliers are at a competitive disadvantage.’ Case COMP/C-3/37.792 *Microsoft* [2004] OJ L32/23, para.833. This statement indicates that the Commission mainly considered harm to the structure of the market and examined whether the effects of conduct were harmful to such structure, rather than to consumers.

<sup>80</sup> Kavanagh, J., Marshall, N. and Niels, G. (2009) ‘Reform of Article 82 EC – Can the Law and Economics be Reconciled?’, in Ezrachi, A. (ed.), *Article 82 EC: Reflections on Its Recent Evolution*, Hart Publishing, United Kingdom, p.13.

<sup>81</sup> Lowe, P. (2009) ‘The European Commission Formulates its Enforcement Priorities as Regards Exclusionary Conduct by Dominant Undertakings’, *Global Competition Policy*, Feb-09 (1), p.10.

<sup>82</sup> Press Release, “Antitrust: Guidance on Commission enforcement priorities in applying Article 82 to exclusionary conduct by dominant firms – frequently asked questions”, MEMO/08/761, Brussels, 3 December 2008.

On the other hand, an effects-based approach can be quite complex and may have some drawbacks, such as too little accountability, the risk of arbitrary treatment, under-enforcement, poor predictability and low administrability.<sup>83</sup> Detailed economic assessments may undermine legal certainty. To a certain extent, dominant firms should be given clear guidance in order to be able to judge the legality of their conduct *vis-à-vis* competition rules, especially when they are willing to pursue new business strategies. Furthermore, adopting an effects-based approach may complicate decision making and take longer for competition authorities to actually assess effects, and therefore risks being unenforceable in the end. From an enforcer's point of view, Lowe states that a pure effects-based approach can be too costly in terms of enforcement and the Commission should also use proxies and presumptions to make enforcement more practical and swift.<sup>84</sup>

All in all, analysing the effects of conduct on consumers stands out as the fundamental part of the assessment of abusive conduct with the shift towards efficiency and consumer welfare. The effects-based approach is the result of advances in economic thinking in the area of unilateral conduct and offers many benefits compared to a form-based approach, despite the fact that it may undermine legal certainty and can be resource-intensive for competition authorities and courts. The Guidance now proposes an approach focusing on the effects of the dominant firm's conduct and reflects the Commission's thinking as to the most effective application of Art.102 in the EU context in order to keep pace with the teachings of modern economics, the constantly evolving dynamics of markets and the industrial development of Europe.<sup>85</sup>

### **2.2.3. The Increasing Use of Economics in Assessing Abuse of a Dominant Position**

Economic considerations are more central to legal analysis in competition law compared to other bodies of law. Competition law is not purely legal; it is very much grounded in economics. Competition law consists of a set of rules that regulate business life and free

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<sup>83</sup> Prieto, C. (2011) "Anticipated Enforcement of in France of the Commission's Guidance on Article 82", in Pace, L. F. (ed.), *European Competition Law: The Impact of the Commission's Guidance on Article 102*, Edward Elgar Publishing, Great Britain, p.135.

<sup>84</sup> Lowe (2007), p.8.

<sup>85</sup> Press Release, "Antitrust: Guidance on Commission enforcement priorities in applying Article 82 to exclusionary conduct by dominant firms – frequently asked questions", MEMO/08/761, Brussels, 3 December 2008.

competition among undertakings in the market place by *inter alia* prohibiting certain forms of joint or unilateral conduct of market participants. The legal framework of the rules is determined by the law, but the content of those rules is mostly determined by economics. According to most economists, economics helps in putting flesh on the bare bones when one attempts to define the vague concepts in competition law such as “restriction of competition” under Art.101 TFEU or “abuse of a dominant position” under Art.102 which seem to have no content on their own.<sup>86</sup> Competition law has surely benefitted in the last generation from an infusion of economic sophistication.<sup>87</sup>

With the modernisation, economic considerations have gained an increasing prominence in the assessment of abusive conduct under Art.102. The basic tenets of the Ordoliberal philosophy neither cite, nor rely on any empirical economic evidence or micro-economic theory; they appeared to be based on a philosophy of political or social economy.<sup>88</sup> Meanwhile, confidence in the value of economics has promoted the use of consumer welfare as the normative reference point.<sup>89</sup> The shift towards the consumer welfare objective has paved the way for the assessment of the effects of abusive conduct, which requires a more economics-based approach. Efficiency requires an effects analysis and a careful examination of consumer benefits that may be yielded by the allegedly abusive exclusionary conduct, not just the exclusionary effects on competitors. As the consumer welfare standard mainly considers the effect of conduct on prices and output, gathering data relevant to assessing the influence of conduct on price and output levels inevitably calls for the use of economic methods.<sup>90</sup>

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<sup>86</sup> See Lianos, I. (2010) “‘Judging’ Economists: Economic Expertise in Competition Law Litigation: A European View”, in Lianos, I. and Kokkoris, I. (eds.), *The Reform of EC Competition Law: New Challenges*, Kluwer Law International, Great Britain, p.243-244 (‘Following the evolution of competition law towards an economic approach, normative economic arguments and theories play an important role in the interpretation of what constitutes a restriction of competition or an abuse of dominant position... their content is related to public policy considerations... which define the scope and the limitations of competition law intervention.’); Bishop and Walker (2010), p.2 (‘The importance of economics is obvious once one recognises that many of the key concepts of competition law... are concepts derived not from law... but from economics.’).

<sup>87</sup> Gavil, A. I. (2004) ‘Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance’, 72 *Antitrust Law Journal*, p.30.

<sup>88</sup> Venit, J. S. (2005) ‘Article 82: The Last Frontier – Fighting Fire with Fire?’, 28 *Fordham Int’l L.J.*, p.1163.

<sup>89</sup> Gerber, D. J. (2010a) ‘Convergence in the Treatment of Dominant Firm Conduct: The US, the EU and the Institutional Embeddedness of Economics’, 76 *Antitrust Law Journal*, p.951-973.

<sup>90</sup> Gerber, D. J. (2010b) *Global Competition: Law, Markets and Globalization*, OUP, Great Britain, p.144.

Because of the complexity of the assessment, an economics-based approach will naturally lend itself to a “rule of reason” approach to competition law, since careful consideration of the specifics of each case is needed, and this is likely to be especially difficult under “per se” rules.<sup>91</sup> Under a per se illegality rule, which is reminiscent of the form-based approach, conduct is *ex ante* deemed as abusive without the need for a detailed inquiry into its effects on consumers; whereas under the rule of reason analysis, effects of the conduct are *ex post* evaluated through an elaborate economic analysis. Economists overwhelmingly agree that a rule of reason based approach is correct when dealing with unilateral conduct and have criticised the past policy under Art.102, since historically a number of practices under this Article had been effectively subject to a strong presumption of illegality.<sup>92</sup> Most commentators have taken a quite negative stance against per se rules to govern abusive conduct.<sup>93</sup>

Although most commentators agree on the use of the rule of reason approach in the area of unilateral conduct, the increasing role of economics in the assessment has been questioned as well. First, economic theories or laws are not a natural law like the Universal Law of Gravitation which can be tested; instead they often rely on hypothesis and assumptions that are only accepted by an overwhelming majority of economists.<sup>94</sup> Economists often differ in their assessment of efficiencies and effects, given the variety of economic models and their underlying assumptions. Furthermore, while the economic theory has produced a unified set of predictions regarding the impact of the agreements between competitors or horizontal mergers, there is no unified theory of foreclosure in the

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<sup>91</sup> EAGCP Report, para.3.

<sup>92</sup> O'Donoghue and Padilla (2013), p.225-226. Many commentators have argued that loyalty rebates have been subject to a per se illegality in case law. See generally Ridyard, D. (2002) ‘Exclusionary Pricing and Price Discrimination Abuses under Article 82 - An Economic Analysis’, *European Competition Law Review*, 23(6), 302 and Kallaugher, J. and Sher, B. (2004) ‘Rebates Revisited: Anti-competitive Effects and Exclusionary Abuse under Article 82’, *European Competition Law Review*, 25(5), p.266.

<sup>93</sup> According to Whish, the economics of abuse is sufficiently complex that this is not an area in which “formalistic” or “per se” rules are particularly appropriate. Whish (2011), p.155. Dabbah contends that the manner in which the per se approach operates is overly formalistic and quite rigid, and for this reason pro-competitive effects of conduct may be overlooked. Dabbah, M. M. (2010) *International and Comparative Competition Law*, CUP, Great Britain, p.241-242. See also Jenny, F. (2010) “Optimal Antitrust Enforcement: From Theory to Policy Options”, in Lianos, I. and Kokkoris, I. (eds.), *The Reform of EC Competition Law: New Challenges*, Kluwer Law International, Great Britain, p.131 (‘One must acknowledge the fact that some antitrust violations, such as abuse of dominance, require a rule of reason analysis...’).

<sup>94</sup> Lianos (2010), p.246.

case of exclusionary practices: The same practice can be pro-competitive or anti-competitive depending on the circumstances.<sup>95</sup>

Dabbah claims that although economists have made an important contribution to the understanding of competition law, they have proved to be simply unable to develop theories suitable for the economic reality of markets and taking into account the implications of variability of different business strategies, market behaviours and structures.<sup>96</sup> Riziotis argues that economic analysis is based on models, which as such deviate from reality, and their outcome varies depending on how many and which variables one takes into account.<sup>97</sup> According to the author, it is not rare that economics offers no clear answer, and therefore the role of economics in competition law decision making should not be over-estimated. Mertikopoulou stresses that economic analysis should be viewed not as an end in itself, but rather as a means of complementing the established legal analysis and maintains that a strict economic perception bears the risk of overlooking the general context and principles of EU competition law.<sup>98</sup>

To conclude, there is almost unanimity on an assessment based on effects of conduct and on a rule of reason approach, as opposed to formalistic and per se illegality rules. However, the same unanimity does not exist on the level and rigour of economic analysis. While most competition economists attribute a very big role for economics in the analysis, competition lawyers tend to show a more reserved approach to the excessive use of economics at the expense of legal certainty and established legal principles. Nevertheless, the modernisation of Art.102 has given a fresh impetus to the use of economic and econometric analysis in the assessment of abusive conduct. A chief competition economist post was created in 2003 within the DG Comp in order to strengthen the economic expertise capabilities of the Commission.<sup>99</sup> Also, many officials within the

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<sup>95</sup> Papandropoulos, P. (2010) “The Implementation of an Effects-Based Approach under Article 82: Principles and Application”, in Lianos, I. and Kokkoris, I. (eds.), *The Reform of EC Competition Law: New Challenges*, Kluwer Law International, Great Britain, p.423.

<sup>96</sup> Dabbah (2010), p.28.

<sup>97</sup> Riziotis (2008), p.101.

<sup>98</sup> Mertikopoulou (2007), p.245.

<sup>99</sup> While the office and role were not created specifically for Art.102 cases, it is fair to say that the reform of Art.102 was one of the most prominent reasons for the creation of this unit. O'Donoghue and Padilla (2013), p.70.

DG Comp have an economics background, and decisions taken today devote much more space to economic evidence and argument than do those from even a few years ago.<sup>100</sup>

### 2.3. From Harm to Competitors to Consumer Harm

#### 2.3.1. The Standard of Harm under Art.102

As discussed in Chapter 1, when the Union dimension element and the dominant position element are omitted from the text of Art.102, the Article merely states that “any abuse shall be prohibited”. This shows that Art.102 does not articulate a standard of competitive harm, which could have helped to explain why certain conduct amounts to an abuse of a dominant position or why abuse is prohibited. Unlike Art.101 TFEU, there is no reference to “object or effect the prevention, restriction or distortion of competition” in the text of Art.102. However, there may be no need for a “restriction of competition” element for conduct to constitute an abuse: If there is only one firm having 100 percent market shares in a market (monopolist), there will be no competition to restrict. In this case, the abuse cannot be exclusionary since there are no firms to exclude from the market.

The traditional abusive practices in this scenario may be exploitative such as an increase in price, reduction in output or a lack of dynamic efficiency. It has been commented that in order to catch these types of conduct and encompass exploitative abuses, it was presumably thought appropriate by the original draftsman to exclude any reference under Art.102 to an “object or effect prevention, restriction or distortion of competition” element similar to that in Art.101 TFEU.<sup>101</sup> However, some judgments in case law appear to make reference to such element even in the context of exclusionary conduct. The GCEU held in *Michelin II* that ‘in the light of the context of Article [102], conduct will be regarded as abusive only if it *restricts competition*.’<sup>102</sup> In *British Airways*,<sup>103</sup> the same Court held the view that ‘[i]t is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to *restrict competition*.’

<sup>100</sup> Goyder and Albors-Llorens (2009), p.12.

<sup>101</sup> Sinclair, D. (2004) ‘Abuse of Dominance at a Crossroads - Potential Effect, Object and Appreciability under Article 82 EC’, *European Competition Law Review*, 25(8), p.492.

<sup>102</sup> *Michelin II*, para.237 (emphasis added).

<sup>103</sup> Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, para.293 (emphasis added). See also Opinion of AG Jacobs in Case C-7/97 *Oscar Bronner v Mediaprint* [1998] ECR I-7791, para.58 (‘[T]he primary purpose of Article [102] is to prevent *distortion of competition*...’) (emphasis added).



In fact, to a great extent, the standard of harm has a bearing on how abuse is defined. In other words, abuse is defined by the harm it causes. The key part of the definitions of abuse set out by commentators centres on the standard of harm. Within this context, a group of commentators have defined abusive conduct as conduct which harms the structure of a market. According to Temple Lang, conduct which ‘*affects the structure of a market*’ is an abuse.<sup>104</sup> Gerber argues that any conduct which ‘*significantly affected the structure of competition*’ could constitute a violation of Article [102].<sup>105</sup> Korah maintains that conduct which ‘*adversely affects the structure of the market*’ may be forbidden under Article [102].<sup>106</sup> Lastly, Rodger and MacCulloch state that any form of conduct which ‘*threatens the competitive structure of the market*’ might be considered abusive.<sup>107</sup> According to these commentators, conduct is abusive because it harms competition or the structure of the market.

Another group of commentators refer to the position of competitors of a dominant firm when defining abusive conduct. Faull and Nikpay contend that conduct which ‘can, directly or indirectly, *affect the competitive position of a competitor*’ might be caught by Article [102].<sup>108</sup> Jones and Sufrin argue that any conduct ‘which *excludes competitors* from the market may be capable of constituting an exclusionary abuse, whatever form it takes.’<sup>109</sup> On the other hand; some commentators, who are mostly competition economists, point to consumer harm as the governing standard of harm. Bishop and Walker highlight that abuse can be defined as ‘a dominant firm adopting a particular mode of behaviour that *significantly reduces consumer welfare* relative to the alternative of the firm not adopting that mode of behaviour.’<sup>110</sup>

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<sup>104</sup> Temple Lang, J. (1979) ‘Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law’, 3 *Fordham Int’l L.J.*, p.30 (emphasis added).

<sup>105</sup> Gerber, D. J. (1987) ‘Law and the Abuse of Economic Power in Europe’, 62 *Tulane Law Review*, p.91 (emphasis added).

<sup>106</sup> Korah, V. (2007) *An Introductory Guide to EC Competition Law and Practice*, 9<sup>th</sup> Edition, Hart Publishing, Great Britain, p.104 (emphasis added).

<sup>107</sup> Rodger, B. J. and MacCulloch, A. (2009) *Competition Law and Policy in the EC and UK*, 4<sup>th</sup> Edition, Routledge-Cavendish, Great Britain, p.118 (emphasis added).

<sup>108</sup> Faull, J. and Nikpay, A. (2007) *The EC Law of Competition*, 2<sup>nd</sup> Edition, OUP, Great Britain, p.352 (emphasis added).

<sup>109</sup> Jones, A. and Sufrin, B. (2014) *EU Competition Law: Text, Cases and Materials*, 5<sup>th</sup> Edition, OUP, Great Britain, p.556 (emphasis added).

<sup>110</sup> Bishop and Walker (2010), p.230 (emphasis added).

With regard to the standard of harm under Art.102, the predominant view of the EU Courts has been the protection of the structure of the market.<sup>111</sup> In the EU, competition laws have protected the competitive structure and dynamics of the market.<sup>112</sup> Protection of this competition process is believed to preserve incentives to compete and to serve both consumers and market actors.<sup>113</sup> An established element of EU competition law is the assumption that protecting competition will ensure that the interests of consumers will be safeguarded.<sup>114</sup> The concern for the structure of the market is based on the assumption that once it excludes its competitors, a dominant firm might begin to charge high prices, which would not have been charged if the market had been subject to effective competition. For this reason, competitors deserve some degree of protection. While the Commission used to refer to consumers, the consideration of consumer interests was often vague, for example a natural consequence of harm to competition, rather than as a direct harm to consumers.<sup>115</sup>

To sum up, there has not been a coherent and unified approach to the standard of harm under Art.102. There is a divergence among commentators as to whom or what should be protected from: Competition (the structure of the market) or competitors or consumers. Harm to competitors and harm to competition are often associated with the economic freedom objective, while harm to consumers is widely advocated by the proponents of the consumer welfare objective. It should be pointed out that there may not be clear distinctions between those three concepts: Protection of competition leads to protection of competitors in some cases,<sup>116</sup> and sometimes harm to competition and harm to consumers seem to mesh with one another.<sup>117</sup> To date, the EU Courts' position has been that a healthy and unimpaired competitive market structure is presumed to be in the interests of consumers. With the modernisation, the emphasis is placed on consumer harm

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<sup>111</sup> See *supra* "2.1.2. Competition as a Process vs. Competition as an Outcome".

<sup>112</sup> Fox, E. M. (2002) 'What is Harm to Competition? Exclusionary Practices and Anti-competitive Effect', 70 *Antitrust Law Journal*, p.392.

<sup>113</sup> *ibid.*

<sup>114</sup> Marsden, P. and Whelan, P. (2006) "'Consumer Detriment' and Its Application in EC and UK Competition Law", *European Competition Law Review*, 27(10), p.569.

<sup>115</sup> Haracoglou, I. (2006) 'Competition Law, Consumer Policy and the Retail Sector: the Systems' Relation and the Effects of a Strengthened Consumer Protection Policy on Competition Law', *The Competition Law Review*, 3(2), p.199.

<sup>116</sup> See *infra* "2.3.2. The Harm to Competition vs. Harm to Competitors Dilemma".

<sup>117</sup> See *infra* "2.3.3. The Growing Concern for Consumer Harm".

as the standard of harm under Art.102 and competition is aimed to be protected not for its own sake, but for the outcomes it may bring in the interests of consumers.

### 2.3.2. The Harm to Competition vs. Harm to Competitors Dilemma

There is a fundamental dilemma between harm to competition and harm to competitors as to which should be the governing standard of harm under Art.102. As will be discussed below, it has almost become a motto in the field of competition law that “competition law protects competition, not competitors”. This implies that harm to competition will be taken into account instead of harm to competitors. On the other hand, competition ceases to exist and monopoly prevails in the absence of competitors, and protection of competition has the indirect effect of protecting competitors in some cases.<sup>118</sup> There is always harm to competitors where there is harm to competition; however, harm to some competitors may not necessarily harm competition. Especially, the assumption of harm to competition from harm to competitors has been criticised by the proponents of the consumer welfare objective. On the whole, distinguishing harm to competition from harm to competitors is by its nature far from being an easy practice and in fact, what is harm to competition is not pure, scientific or absolute.<sup>119</sup>

Protection of competitors is generally not endorsed in the US and a great deal of judgments has reiterated that US antitrust law is concerned with ‘the protection of *competition*, not *competitors*.’<sup>120</sup> The US Court of Appeals held that ‘[t]he antitrust laws are for the benefit of competition, not competitors.’<sup>121</sup> In another judgment, the same Court made it clear that ‘[t]he purpose of the antitrust laws as it is understood in the modern cases is to preserve the health of the competitive process... rather than to promote the welfare of particular competitors.’<sup>122</sup> According to the Court, a practice is not ‘anticompetitive’ simply because it harms competitors; it is ‘anticompetitive’ only if it harms the competitive process.<sup>123</sup> In the same vein, it was held that ‘to constitute a violation the monopolist's

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<sup>118</sup> See Gavil (2004), p.81 (“[T]he antitrust laws are designed to protect competition, not competitors” is an empty slogan. There can be no competition without competitors.’).

<sup>119</sup> Fox, E. M. (2003) ‘We Protect Competition, You Protect Competitors’, *World Competition*, 26(2), p.162.

<sup>120</sup> *Brown Shoe Co. v United States*, 370 US 294 (1962), para.320 (emphasis original).

<sup>121</sup> *Ball Memorial Hospital, Inc. v Mutual Hospital Insurance, Inc.*, 784 F.2d 1325 (7<sup>th</sup> Cir. 1986), para.44.

<sup>122</sup> *Brunswick Corp. v Riegel Textile Corp.*, 752 F.2d 261 (7<sup>th</sup> Cir. 1984), para.266.

<sup>123</sup> *Town of Concord v Boston Edison Co.*, 915 F.2d 17 (1<sup>st</sup> Cir. 1990), para.18.

activities must tend to cause harm to competition; unrelated harm to an individual competitor or consumer is not sufficient.’<sup>124</sup> Lastly, the US Supreme Court found that conduct that ‘may impose painful losses on [competitors] is of no moment to the antitrust laws if competition is not injured.’<sup>125</sup>

One of the criticisms that is most frequently levelled by US commentators at EU competition law is that it protects competitors whereas it should focus on the protection of competition, or of the competitive process. Easterbrook, a US commentator as well as a federal judge, states that competition is ‘a ruthless process’, and therefore the deeper the injury to rivals, the greater the potential benefit is.<sup>126</sup> Accordingly, the injuries to competitors are ‘byproducts of vigorous competition’, but ‘the antitrust laws are not balm for rivals’ wounds.’<sup>127</sup> The view in the US is that competition law and policy should be about protecting competition, not about protecting or defending competitors which are not as efficient as dominant firms. Competition is about winners and losers and what is important is safeguarding not competitors per se, but the competitive process whereby more efficient firms win at the expense of less efficient rivals.<sup>128</sup> By contrast, much of the decisional practice of the Commission and the case law of the EU Courts centre around the tendency to assume detrimental effects on consumers from the exclusion of competitors.<sup>129</sup>

With the modernisation of Art.102, the focus of the assessment shifts towards efficiency triggering a movement towards harm to competition as the standard of harm. The idea of protecting competitors with a view to furthering competition in the market has lost ground after the embracement of the concept of efficiency and the introduction of the “as efficient competitor” test. Under this test, exclusionary conduct amounts to an abuse, if it is likely to exclude from the market an equally (or more) efficient competitor of the dominant firm.<sup>130</sup> The underlying idea is that harm to inefficient competitors is not translated into harm to competition, while harm to competitors who are as efficient as the dominant firm

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<sup>124</sup> *Mr. Furniture Warehouse, Inc. v Barclays American/Commercial Inc.*, 919 F.2d 1517 (11<sup>th</sup> Cir. 1990), para.1522.

<sup>125</sup> *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209 (1993), para.224.

<sup>126</sup> *Ball Memorial Hospital, Inc. v Mutual Hospital Insurance, Inc.*, 784 F.2d 1325 (7<sup>th</sup> Cir. 1986), para.44.

<sup>127</sup> *ibid.*

<sup>128</sup> Waelbroeck (2005), p.151.

<sup>129</sup> Jones and Sufrin (2014), p.382

<sup>130</sup> See *infra* “3.2.2. The “As Efficient Competitor” Test”.

causes harm to competition. “As efficient competitors” are not protected for the sake of their freedom to compete in an open market; they are protected because their exclusion is likely to reduce consumer welfare. Protection of less efficient competitors is thought to translate into protection of competitors from the very essence of competition itself such as lower prices, better quality, choice and so on.<sup>131</sup>

To conclude, a dilemma exists between harm to competition and harm to competitors and the choice between these two types of standard of harm is made in favour of the former, at least in the US. The shift towards efficiency requires that harm to competitors should not be used as a shortcut to prove harm to competition in the assessment of abusive conduct. It has been stressed that there is no economic support for the legal presumption that any harm to competitors arising from the conduct of a dominant firm necessarily harms competition.<sup>132</sup> Instead, commentators have come to argue that if the allegedly abusive conduct can be seen as an improvement in a competitive offering, on any of the criteria of price, quality, or choice; it should not be condemned no matter what it does to competitors.<sup>133</sup> The Guidance now recognises that ‘what really matters is protecting an effective competitive process and not simply protecting competitors’ (para.6) and adopts the “as efficient competitor” test for price-based exclusionary conduct in order to distinguish harm to competition from harm to competitors.

### **2.3.3. The Growing Concern for Consumer Harm**

Competition authorities all around the world are becoming more conscious of the impact that competition policy and law enforcement has on consumers.<sup>134</sup> Consumer harm has come to the fore as a factor in the analysis when economists, with a principal focus on efficiency, assumed a leading role in antitrust scholarship.<sup>135</sup> The modernisation of Art.102 has placed a strong emphasis on the promotion of efficiency and consumer welfare. It has been observed that identifying consumer harm is the primary impetus of modernisation of

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<sup>131</sup> See Whish, R. and Bailey, D. (2012) *Competition Law*, 7<sup>th</sup> Edition, OUP, Great Britain, p.193 (‘It would be the ultimate paradox if a law designed to promote competition in fact were to have the effect of diminishing it.’).

<sup>132</sup> Bishop and Walker (2010), p.236.

<sup>133</sup> Marsden (2010a), p.417

<sup>134</sup> Cseres, K. J. (2006) ‘The Controversies of the Consumer Welfare Standard’, *The Competition Law Review*, 3(2), p.128.

<sup>135</sup> Cudahy, R. D. and Devlin, A. A. (2010) ‘Anticompetitive Effect’, 95 *Minnesota Law Review*, p.84.

Art.102.<sup>136</sup> With the modernisation; consumers, who have been often regarded by the EU Courts as the “ultimate beneficiaries” of Art.102 through the protection of competition as a process, are intended to be the “direct beneficiaries” through the protection of competition as an outcome. The growing concern for consumer harm mirrors that conduct should only be considered as abusive where it generates actual or likely consumer harm.

Harm to consumers has been argued to be the necessary part of the assessment because almost all types of unilateral conduct restrict the economic freedom of competitors of the dominant firm by forcing them to be more competitive in order to win back business; however, only some of them actually harm consumers. If conduct is prohibited in the absence of consumer harm, there is a risk that pro-competitive activity might be prevented and deterred in the future, which might cause harm by denying consumers innovative and lower-priced products.<sup>137</sup> Harm to consumers includes increased prices, missed opportunities to pay lower prices, passing-on off costs, the imposition of unfavourable sales conditions on consumers, and reductions in innovation, service, quality and choice.<sup>138</sup> However, the best evidence of consumer harm is evidence that the conduct has had a material effect on output and prices, such as reducing output or increasing prices.<sup>139</sup>

Before the modernisation, the proof of consumer harm was not paid much attention by the Commission and the EU Courts.<sup>140</sup> The established view was that the proof of actual consumer harm is not required since it can be inferred from harm to competition. Indeed, an established element of EU competition law is the assumption that protecting competition will ensure that the interests of consumers will be safeguarded.<sup>141</sup> The direct actual or

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<sup>136</sup> CLF (2006) ‘The Reform of Article 82: Comments on the DG-Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuses’, *European Competition Journal*, 2(1), p.171.

<sup>137</sup> *ibid* at p.170.

<sup>138</sup> Marsden and Whelan (2006), p.584.

<sup>139</sup> O’Donoghue and Padilla (2013), p.276.

<sup>140</sup> It appears that consumer harm seems to have been considered as part of the analysis on some forms of abusive conduct. Exploitative abuses, by their nature, harm consumers directly, and therefore consumer harm is essential. However, consumer harm was not seen as a necessary condition for most types of exclusionary conduct, perhaps with the exception of refusal to licence intellectual property rights. See, for example, the condition of prevention of a potential consumer demand as indicative of consumer harm in *Joined Cases C-241/91 P and C-242/91 P RTE and ITP v Commission* [1995] ECR I-0743 and *Case C-418/01 IMS Health v NDC Health* [2004] ECR I-5039. Explaining this issue, Marsden and Whelan find that this difference in the approach is due to particular form of abuse itself, rather than to any fundamental belief that consumer harm should be proven. Marsden and Whelan (2006), p.584.

<sup>141</sup> *ibid* at p.569.

potential effect of conduct on consumers is generally not considered.<sup>142</sup> In the landmark *British Airways* judgment, the GCEU held that Art.102 ‘does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers’ and maintained that the Article ‘concentrates upon protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected.’<sup>143</sup> In sharp contrast, in the US, substantial and actual harm to consumers has to be proved before competition liability can be established.<sup>144</sup>

Although consumer harm as part of the assessment of abusive conduct is currently in ascendancy, sometimes harm to competition and harm to consumers seem to mesh with one another and are used interchangeably. With the growing concern for consumer harm after the modernisation, the question arises as to whether both types of harm are jointly necessary for a finding of abuse,<sup>145</sup> or harm to competition is one and the same thing as harm to consumers,<sup>146</sup> or alternatively, harm to competition also causes harm to consumers at the same time. Unlike the first two situations both of which can be justifiable in some respects, the last one seems to set forth an assumption of consumer harm from the proof of harm to competition. This is actually the view taken by the EU Courts to date and is not in line with the main premises of the modernisation of Art.102 as it may lead to protection of competitors.

Consequently, the modernisation has created a growing concern for the proof of consumer harm as part of the assessment of abusive conduct, and consumers have begun to be viewed as the “direct beneficiaries” in the enforcement of Art.102. An assessment based on harm to consumers means that the conduct should only be considered as abusive where

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<sup>142</sup> *ibid* at p.584.

<sup>143</sup> Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, para.264.

<sup>144</sup> Cseres (2006), p.148.

<sup>145</sup> Haracoglou rightly finds that harm to competition and harm to consumers at the same time make conduct abusive, because where there is harm to consumers but no harm to competition, there may not be a scope for competition law and consumer protection laws may apply. On the other hand, where there is harm to competition but no harm to consumers, then this may lead to the assumption of consumer harm. Haracoglou (2006), p.206.

<sup>146</sup> This is the view taken by the EAGCP Report which seems to consider harm to consumers as the only type of standard of harm and takes a negative stance against the protection of competition as this might lead to the protection of a particular market structure and competitors. EAGCP Report, paras.7-9. See also O’Donoghue and Padilla (2013), p.274 ([A]lthough harm to an “effective competition structure” has sometimes been mentioned as a possible alternative to direct consumer harm, the two concepts should amount to the same thing: unless there is consumer harm, there is no relevant harm to the “structure of competition.”).

it generates actual or likely consumer harm. The Guidance states that the Commission will focus on ‘those types of conduct that are most harmful to consumers’ and ensure that no ‘adverse impact on consumer welfare’ will be permitted (paras.5 and 19). Although the Guidance now includes harm to consumers into the assessment, it is rather unclear whether harm to competition and harm to consumers are jointly necessary or harm to competition is one and the same thing as harm to consumers under the Guidance.<sup>147</sup>

## Conclusion

Chapter 2 highlighted the changes in the Commission’s substantive assessment of abuse of a dominant position under Art.102 in the backdrop of the modernisation process. This Chapter identified three fundamental changes in the Commission’s new reading of Art.102 and analysed each of those three changes in three different sections: With the modernisation, the Commission has aimed to steer the enforcement of Art.102 from a reliance on the special responsibility towards a greater recognition of efficiency (Section 2.1), from an approach based on the form of conduct towards an approach that is concerned with the effects of conduct (Section 2.2) and lastly from the presence of harm to competitors to the analysis of consumer harm (Section 2.3). Section 2.1 observed that the modernisation of Art.102 is instrumental in the shift towards efficiency and since efficiency has been brought to the fore, special responsibility seems to be no longer necessary, if not contradictory, in the enforcement of Art.102 and this eventually results in competition to be viewed as an outcome. Section 2.2 observed that the modernisation of Art.102 has given a fresh impetus to the use of economic analysis in the assessment of abusive conduct and the traditional form-based approach, which is no longer regarded as an appropriate approach, has been replaced with the effects-based approach, which is the result of advances in economic thinking in the area of unilateral conduct. Finally, Section 2.3 observed that the modernisation has placed a strong emphasis on the proof of consumer harm as part of the assessment of abuse under Art.102, and while there are still doubts as to whether harm to competition is one and the same thing as consumer harm, the use of harm to competitors as shortcut to prove harm to competition has lost ground.

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<sup>147</sup> For a detailed analysis of harm to competition and harm to consumers under the Guidance, see *infra* “3.2.1. Anti-competitive Foreclosure”.



## **CHAPTER 3 – GUIDANCE ON THE COMMISSION’S ENFORCEMENT PRIORITIES IN APPLYING ART.102**

### **Introduction**

Chapter 3 explores two sub-questions: Firstly, what has the Guidance brought to the enforcement of Art.102? Secondly, how has that enforcement moved forward since the publication of the Guidance? This Chapter is devoted to the analysis of the Guidance as the main outcome of the modernisation process and the culmination of the Commission’s efforts to modernise the manner it enforces Art.102. The Chapter is not confined to the mere analysis of the paragraphs of the Guidance. Instead it analyses the Guidance within a broader framework which includes the purpose behind adopting the Guidance, the legal regime of the Guidance in EU competition law, commentators’ criticisms that have been levelled against the Guidance, the specific contributions of the Guidance to the enforcement of Art.102, and lastly the legal and institutional landscape which has shaped the post-Guidance period in the aftermath of its official publication in early 2009.

Chapter 3 is divided into three sections. Section 3.1 is on the purpose and the legal regime of the Guidance. This Section critically analyses the purpose of the Guidance by shedding light on its paragraphs with a view to showing as to what extent the effects-based and consumer welfare-oriented spirit of the modernisation is reflected throughout the Guidance. It then discusses the legal regime of the Guidance as a soft law instrument *vis-à-vis* the case law of the EU Courts. Lastly it examines commentators’ responses to the Guidance in the literature as the Guidance has caused a great deal of controversy arising from its title to its substantive content. Section 3.1 observes that the Guidance was carefully worded as “Guidance” instead of “Guidelines” and although it is said to contain only “enforcement priorities” of the Commission, many of its paragraphs offer interpretations that differ significantly from the EU Courts’ case law on various points which leads one to the conclusion that the Commission intended to shape the future direction of the law on Art.102.

Section 3.2 provides an overview of the contributions of the Guidance to the enforcement of Art.102 and examines the four elements which have been introduced as the

major contributions in this respect, namely the concept of anti-competitive foreclosure, the “as efficient competitor” test, efficiency defence and detailed assessments on specific forms of abusive exclusionary conduct. These four elements stand out as the most novel parts of the Guidance and aim at steering the enforcement of Art.102 from an Ordoliberal foundation towards an effects-based approach with a consumer welfare standard. Section 3.2 observes that all of the four contributions of the Guidance are actually designed to promote an effects-based and consumer welfare-oriented enforcement of Art.102 which aim to achieve a substantive assessment of abusive conduct based on the effects it generates on consumers with the help of economic and econometric analysis.

Section 3.3 explores the post-Guidance period from 2009. This Section is based on the premise that the enforcement of the Guidance is as important as its publication; therefore a discussion on the legal and institutional landscape which has shaped the post-Guidance period is essential. It explores the initial expectations from the post-Guidance period, as well as the reaction of the EU Courts to the Commission’s new reading of Art.102. The Commission’s own practice in the post-Guidance period is given special consideration; whether the Commission has complied with the principles in the Guidance, whether the post-Guidance decisions are in accordance with the Commission’s “enforcement priorities”, how the allegations of abuse have appeared and how the cases have been assessed are extensively discussed in this Section. Section 3.3 observes that Art.9 Regulation 1/2003 commitments mark another, albeit informal, stage in the modernisation of Art.102, as the Commission’s increasing use of such commitments has outstripped many practical discussions that were expected to take place after the issue of the Guidance but instead created new problems on the appropriateness, legal review and excessive use of commitments in Art.102 cases.

### **3.1. The Purpose and the Legal Regime of the Guidance**

#### **3.1.1. Guidance on Enforcement Priorities Rather than “Guidelines on Art.102”**

The Guidance is the culmination of the Commission’s efforts to modernise the manner it enforces Art.102 to unilateral conduct by dominant firms. As it is issued in the context of modernisation, evidently its purpose should be to further the modernisation. Chapter 2 outlined the changes in the Commission’s approach towards the interpretation of abuse of a

dominant position with the modernisation Art.102 and showed, to a certain extent, what can be expected from the Guidance. In this respect, one expects the Guidance to show the Commission's overall willingness to adopt a more economics-based approach, by articulating and clarifying some level of economic analysis or principles guiding its future enforcement of Art.102. It is worth looking at the Guidance itself on determining its purpose. Pursuant to para.2 of the Guidance:

‘...Alongside the Commission's specific enforcement decisions, it is intended to provide greater clarity and predictability as regards the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether certain behaviour is likely to result in intervention by the Commission under Article [102].’

Para.2 implies that the general purpose of the Guidance is to show the Commission's general framework of analysis of abusive conduct which is expected to be more clear, predictable and foreseeable after the issue of the Guidance. This paragraph does not mention anything about the economics-based approach or the consumer welfare objective as the hallmarks of the modernisation of Art.102; this was expressed in the Commission's Press Release more clearly.<sup>1</sup> Para.5 states that under its general framework of analysis, the Commission will ‘focus on’ abusive conduct which is ‘most harmful to consumers’ with a view to ensuring that ‘markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings.’

Further to this end, para.6 seems to be related to the aim of the Commission, rather than that of the Guidance, in the enforcement of Art.102. Accordingly, ‘the emphasis’ of the Commission's enforcement of Art.102 is on ‘safeguarding the competitive process in the internal market’ and ensuring that dominant undertakings do not exclude their competitors ‘by other means than competition on the merits’ (para.6). Rather than articulating an economics-based approach as normally expected, the Guidance uses the term ‘competitive process’ which is generally protected as a value in itself under the

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<sup>1</sup> ‘The guidance paper sets out an economic and effects-based approach to exclusionary conduct... This document provides for the first time comprehensive guidance to stakeholders, in particular the business community and competition law enforcers at national level, as to how the Commission uses an effects-based approach to establish its enforcement priorities under Article [102]...’ Press Release, “Antitrust: Consumer welfare at heart of Commission fight against abuses by dominant undertakings”, IP/08/1877, Brussels, 3 December 2008.

economic freedom objective.<sup>2</sup> It is noteworthy that the Guidance does not refer to, for example, “safeguarding the interests of consumers”, which could have been more in line with the main premises of the modernisation.

However, para.6 continues to state that safeguarding the competitive process may require competitors, ‘who deliver less to consumers’, to leave the market. This is consistent with the generally accepted proposition that it will not be an abuse, if competitors are driven out from the market as long as the dominant firm is competing on the merits. The phrase “who deliver less to consumers” is particularly used to indicate the difference between “as efficient competitors” and inefficient or not yet “as efficient competitors”. Exclusion of “as efficient competitors” and inefficient or not yet “as efficient competitors” will then be subject to a different treatment. This is more in line with the consumer welfare approach which takes account of the extent of efficiency of competitors as it is deemed to have a bearing on the benefits they may bring to consumers.

Although the purpose of the Guidance does not appear to be crystal clear, meaning that it is sending mixed signals between the consumer welfare and economic freedom objectives, it is clear that the Guidance is dealing with the Commission’s “enforcement priorities”. Turning back to para.2, the Guidance begins by stating that it sets out enforcement priorities that will guide the Commission’s action in applying Art.102.<sup>3</sup> This confirms the title of the Guidance which is, as indicated before, “Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings”. The language in other sections of the Guidance is also indicative of the Commission’s willingness to set out its enforcement priorities.<sup>4</sup>

Enforcement priorities indicate that the Commission has made it clear from the outset that it will prioritise certain cases over others. Actually, this is not an uncommon

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<sup>2</sup> See also para.30 where the Guidance refers to ‘competitive process’ and even ‘protection of rivalry’.

<sup>3</sup> Para.7 also speaks of ‘providing guidance on [the Commission’s] enforcement priorities’, while para.8 uses another term, ‘enforcement principles’.

<sup>4</sup> See, for example, para.20 (‘The Commission *will normally intervene under Article [102]* where... the allegedly abusive conduct is likely to lead to anti-competitive foreclosure.’); para.34 (‘The Commission *will focus its attention on those cases* where it is likely that consumers as a whole will not benefit.’); and para.50 (‘The Commission *will normally take action under Article [102]* where an undertaking is dominant in the tying market...’) (emphasis added).

practice of administrative bodies in their decision making process. Objectively speaking, resources of competition authorities are often limited. There may be few case handlers who may not manage to deal with all aspects of each and every case. By contrast, dominant firms defend themselves with reputable lawyers who have negotiation skills, probably superior to those of the Commission. They also hire economists who often complicate matters by making complex economic assessments and explaining different economic models through a pile of documents. Under these circumstances, it is ideal that scarce resources of competition authorities are used more efficiently and only in cases where this is necessary.

On the other hand, because it sets out the enforcement priorities of the Commission, the Guidance does not constitute “Guidelines” in a legal sense. As it is not “Guidelines on the application of Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings”, it should not offer a new interpretation of the existing case law on Art.102.<sup>5</sup> Sounding like a disclaimer, para.3 stresses that the Guidance is not intended to constitute a statement of the law and is without prejudice to the interpretation of Art.102 by the EU Courts. This follows from the fact that the Commission may only act within its legal remit and cannot strike down the previous judgments of the EU Courts, no matter how incompatible they can be with the Guidance. But unlike the Discussion Paper, the Guidance is an official document and has an enforcement status.<sup>6</sup>

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<sup>5</sup> At this point it is worth noting the existence of diverging and conflicting views between the DG Comp and the Commission’s Legal Service with regard to the contents and legal regime of the Guidance. As Pace observes well, the DG Comp intended to clarify and modify the interpretation of Art.102 in line with the new principles it developed during the modernisation of Art.102. The DG Comp was originally thinking about publishing the Guidance in the form of a “Notice”. However, the Legal Service was opposed to publishing the Guidance as a Notice since it did not set out the EU Courts’ case law as should be the case with a Notice. When the DG Comp decided to proceed with the modernisation, it issued the final document under a different legal title. At the end, the Guidance saw the light of day as a “Communication”. Pace, L. F. (2011) “The Italian Way of Tackling the Abuse of a Dominant Position and the Inconsistencies of the Commission’s Guidance: Not a Notice/Bekanntmachung but a Communication/Mitteilung”, in Pace, L. F. (ed.), *European Competition Law: The Impact of the Commission’s Guidance on Article 102*, Edward Elgar Publishing, Great Britain, p.107. This inside information explains why the Guidance was not intended to constitute a statement of the law and was without prejudice to the interpretation of Art.102 by the EU Courts as stated in para.3. See also *infra* “3.1.2. Commentators’ Responses to the Guidance”.

<sup>6</sup> Pace reminds that the Discussion Paper was the work of the DG Comp, but the Guidance was the result of a broad consultation within the Commission as a whole and was therefore significantly different from the Discussion Paper in terms of both ambition and substance. *ibid* at p.105.

At this point, one could argue as to how a more economics-based approach can be reconciled with the existing formalistic case law of the EU Courts. Adoption of such an approach inevitably requires a certain degree of departure from the *de lege lata* law on Art.102. Since the Guidance is not labelled as “Guidelines” and only sets out enforcement priorities in this respect, it is arguable whether it is indeed the appropriate or ideal tool for the transition to the economics-based approach. If the EU Courts do not alter their interpretation, the Commission cannot legally do this on its own as an administrative body. This is because the Treaty gives the legal right to interpret what is an abuse and what is not an abuse of a dominant position under Art.102 to the CJEU;<sup>7</sup> the Commission ensures the application of Art.102 under the judicial review of the GCEU and the CJEU.

As the Commission was constrained by the interpretation of Art.102 by the EU Courts and the established jurisprudence thus tied its hands, the only viable option remained to the Commission was to set out its enforcement priorities by prioritising cases which are potentially more harmful to consumer welfare or eligible for the adoption of an economics-based approach. By prioritising cases which it deems as more detrimental to consumers so as to avoid protecting competitors, the Commission might be able to shape the future enforcement of Art.102 in a more consumer welfare-oriented direction. Nevertheless, such a change of direction would require the demonstration of some level of substantive analysis, which ought to be more grounded in economics. Therefore, the Commission had to demonstrate something more than enforcement priorities.

In fact, a closer look at the Guidance shows that it does more than to set out enforcement priorities; it also includes the Commission’s views on certain points from the outset. For example, para.73 states that it is less likely for a dominant firm to engage in predation, if the conduct concerns a low price applied generally for a long period of time.<sup>8</sup> This paragraph is not related to an enforcement priority as it is more concerned with a situation where the conduct in question is deemed as less abusive, if not wholly legitimate. In a way, many paragraphs like this paragraph offer a new or different interpretation and eventually bring the Guidance closer to the level of Guidelines. It is noteworthy that the

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<sup>7</sup> See Art.263 TFEU and Art.267 TFEU for the jurisdiction of the CJEU to interpret the Treaty provisions, in this respect Art.102.

<sup>8</sup> See also para.72.

Guidance refers to past judgments of the EU Courts to substantiate its arguments when there are overlaps, but tends to stick to its own arguments whenever it departs from the case law.<sup>9</sup>

Some sections of the Guidance are drafted just like judgments and offer an interpretation of the law which is different from some of the past judgments of the EU Courts. The Commission merely uses the phrase “enforcement priority” and states that it will consider a certain practice as an enforcement priority if the conditions of its new criteria are met. To take but one example, para.81 states that the Commission will consider refusal to supply as an enforcement priority if (i) the refusal relates to a product that is “objectively necessary” to be able to compete effectively on a downstream market,<sup>10</sup> (ii) is likely to lead to the elimination of effective competition on the downstream market and (iii) is likely to lead to consumer harm. This sounds more like substantive criteria for refusal to supply to amount to an abuse, rather than the Commission considering it as an enforcement priority.

All in all, the purpose of the Guidance can be summarised as providing greater clarity and predictability on the Commission’s general framework of analysis of abusive conduct, as well as showing some level of analysis and guiding principles for the most harmful types of abusive conduct that will be tackled by the Commission with a view to safeguarding the competitive process in the internal market. The Guidance only sets out the Commission’s enforcement priorities mostly because this was the only thing the Commission could do within its legal remit *vis-à-vis* the existing formalistic judgments of

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<sup>9</sup> For instance, the Commission seems to disregard the presence of “recoupment” in predation cases (which is considered by many scholars as a necessity under the consumer welfare approach), and in order to escape possible criticisms, it refers to a judgment of the GCEU, according to which recoupment was not treated as an essential element in establishing predation as an abuse of a dominant position. Fn.6 linked to para.71 explicitly states that ‘[t]his was confirmed in Case T-83/91 *Tetra Pak International v Commission (Tetra Pak II)* [1994] ECR II-755... where the [GCEU] stated that proof of actual recoupment was not required...’ On the other hand, the Guidance makes no reference to case law at all for “anti-competitive foreclosure” which is at the heart of the document.

<sup>10</sup> This concept is actually new to the established law on refusal to supply and indicates the Commission’s new interpretation. It can be argued that it corresponds to the concept of “indispensability” in the case law on refusal to supply as stated in Case C-7/97 *Oscar Bronner v Mediaprint* [1998] ECR I-7791. The third condition also does not exist in the established case law; the relevant case on this matter speaks of the refusal preventing the appearance of a new product for which there is potential consumer demand, but not exactly “consumer harm” as the Commission sets out in the Guidance. Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission (Magill)* [1995] ECR I-0743.

the EU Courts. While the Guidance is said to contain only enforcement priorities, many of its paragraphs offer interpretations that differ significantly from the case law on various points which leads one to the conclusion that the Commission has aimed to shape the future direction of the law on Art.102.

### **3.1.2. Commentators' Responses to the Guidance**

The issue of the Guidance has attracted a significant amount of attention among scholars, practitioners and business representatives. Indeed the Guidance has caused a great deal of controversy and did not fully please everyone; even scholars who are happy with its publication nevertheless drew attention to some contradictions in it. On the whole, proponents of the consumer welfare objective and of the effect-based approach welcome the Guidance and are mostly satisfied with the focus on the effects of abusive conduct on consumers and efficiency considerations. On the other hand, the opponents object to the publication of the Guidance which, in their view, disregards the established jurisprudence of the EU Courts. Criticisms have been levelled against many aspects of the Guidance ranging from its title to its substantive content.

The first ground for criticism is the fact that the Guidance opts for a more economics-based approach into abuse of a dominant position under Art.102 and few proponents of the form-based approach have criticised the Commission for not complying with the established case law. The second ground for criticism is related to the setting out of enforcement priorities and some commentators, while happy with the effects-based approach, have objected to the issue of the final document as “Guidance”, instead of “Guidelines”. The third and the last ground is more concerned with the substantive content of the Guidance, and some commentators have challenged the rigour and sophistication of the Commission’s assessment of abusive conduct.

To start with the first group of criticisms; Mestmäcker, who is a pupil of one of the founding fathers of Ordoliberalism, clearly takes a negative stance against the Guidance and argues that in spite of the Commission’s disclaimer that the document is not intended to constitute a statement of law, it nevertheless and inevitably deals with the interpretation of Art.102 and the major principles developed during almost half a century case law and



administrative practice.<sup>11</sup> Similarly, Pace accused the Commission of distorting the EU Courts' case law to make it fit the new and different interpretation of Art.102, which is in marked contrast with both the EU Courts' case law and the wording of the Article itself.<sup>12</sup>

Gormsen takes the view that the Commission's new interpretations in the Guidance ignore the case law of the EU Courts and accuses the Commission of acting outside of its remit.<sup>13</sup> The author expresses the view that she does not disagree with the Commission's move to an effects-based approach, but insists that the case law also takes into account "object" and "intent", and pays attention to structure of the market; therefore, consumer welfare cannot be the ultimate goal of Art.102 by means of the Commission's soft law. She draws attention to the legal uncertainty created by the Guidance and contends that a dominant firm will still have to follow the existing case law, but also know that the Commission has begun to interpret Art.102 differently. For all these reasons, the author respectfully suggests that the Commission withdraws the Guidance.

Notwithstanding the departure from the case law, some commentators have taken a positive stance towards the Guidance. Whish regards the Guidance as 'an invaluable contribution', although he makes it clear that the EU Courts determine what is and what is not an abuse of a dominant position, and the Commission cannot contradict established jurisprudence.<sup>14</sup> The author thinks that over a period of time, the Guidance will have an influence on the future orientation of Art.102 and will play an important part in the 'soft

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<sup>11</sup> Mestmäcker, E. J. (2011) "The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008", in Pace, L. F. (ed.), *European Competition Law: The Impact of the Commission's Guidance on Article 102*, Edward Elgar Publishing, Great Britain, p.29.

<sup>12</sup> Pace (2011), p.112. See also Witt, A. C. (2010) 'The Commission's Guidance Paper on Abusive Exclusionary Conduct - More Radical Than It Appears?', *European Law Review*, 35(2), p.235 ('The discrepancy between th[e] well-established case law and the Guidance Paper...along with non-legal nature of the Communication and its theoretical vagueness is likely to engender substantial legal uncertainty...').

<sup>13</sup> Gormsen, L. L. (2010b) 'Why the European Commission's Enforcement Priorities on Article 82 EC Should Be Withdrawn?', *European Competition Law Review*, 31(2), p.46-51. The author also claims that labelling the Guidance as "enforcement priorities" is a false dichotomy, because they are in effect "substantive Guidelines". Similarly, Geradin argues that the Guidance provides a series of analytical principles of the type that would normally be found in guidelines. Geradin, D. (2010) "Is the Guidance Paper on the Commission's Enforcement Priorities in Enforcing Article 102 TFEU Useful?", in Etro, F. and Kokkoris, I. (eds.), *Competition Law and the Enforcement of Article 102*, OUP, Great Britain, p.50.

<sup>14</sup> Whish, R. (2011) "National Competition Law Goals and the Commission's Guidance on Article 82EC: The UK Experience", in Pace, L. F. (ed.), *European Competition Law: The Impact of the Commission's Guidance on Article 102*, Edward Elgar Publishing, Great Britain, p.161.

convergence’ of standards in the treatment of unilateral conduct within the EU.<sup>15</sup> O’Donoghue and Padilla seem to support the Commission’s departure from the case law and assert that a Commission document that did nothing more than to summarise the pre-existing case law would have been self-defeating given that the main impetus for change was the unsatisfactory nature of the case law itself.<sup>16</sup> Other commentators have also welcomed the Guidance, in particular its effects-based approach.<sup>17</sup>

The second group of criticisms is mainly directed to the setting out of enforcement priorities and the title of the Guidance which, as argued, does not accurately reflect the content of the document. The term “Guidance” has been found as suggestive of assistance and advice, rather than rules.<sup>18</sup> Some authors are of the opinion that the Guidance has an ‘unusual’<sup>19</sup> or ‘atypical’<sup>20</sup> title that is ‘not recognised in any of the legislative acts as set out in the EU Treaties’.<sup>21</sup> Pace contends that the title gives the impression that the objective of the Guidance is no longer, as it was in the Discussion Paper, to identify how Art.102 should henceforth be interpreted.<sup>22</sup> According to the title, the objective of the Guidance is to identify the Commission’s enforcement priorities in applying Art.102, not to change the interpretation of that Article. The author finds the title of the Guidance in conflict with para.2 which shows that the purpose of the Guidance is to modify the interpretation of Art.102.

By contrast, Whish and Bailey find the criticism that the Guidance failed to establish enforcement priorities ‘unconvincing’, and insist that the Guidance is not a set of

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<sup>15</sup> *ibid* at p.162.

<sup>16</sup> O’Donoghue, R. and Padilla, J. (2013) *The Law and Economics of Article 102 TFEU*, 2<sup>nd</sup> Edition, Hart Publishing, Great Britain, p.74

<sup>17</sup> See Ridyard, D. (2009) ‘The Commission’s Article 82 Guidelines: Some Reflections on Economic Issues’, *European Competition Law Review*, 30(5), p.235 (‘It is useful and welcome to see a document from the Commission that has clearly been influenced by economic thinking, and that encourages the idea that a wide range of dominant firm conduct can usefully be analysed within a more general framework against exclusionary behaviour that leads ultimately to harm to consumers.’) and Ezrachi, A. (2009) ‘The Commission’s Guidance on Article 82 EC and the Effects Based Approach – Legal and Practical Challenges’, in Ezrachi, A. (ed.), *Article 82 EC: Reflections on Its Recent Evolution*, Hart Publishing, United Kingdom, p.53 (‘[T]he introduction of effects-based variant in the Commission’s analysis is to be welcomed.’).

<sup>18</sup> Witt (2010), p.218.

<sup>19</sup> Prieto, C. (2011) ‘Anticipated Enforcement of in France of the Commission’s Guidance on Article 82’, in Pace, L. F. (ed.), *European Competition Law: The Impact of the Commission’s Guidance on Article 102*, Edward Elgar Publishing, Great Britain, p.139.

<sup>20</sup> Pace (2011), p.116.

<sup>21</sup> O’Donoghue and Padilla (2013), p.75.

<sup>22</sup> Pace (2011), p.106.

substantive Guidelines that slavishly describe the existing law on Art.102.<sup>23</sup> Rather it explains, as the authors maintain, why the Commission would have a greater interest in prosecuting some cases than others; especially it explains that it is the likelihood that particular conduct could cause seriously anti-competitive foreclosure effects on market, thereby causing harm to consumers, that legitimates intervention by the Commission. According to Ezrachi, it is not by chance that the document was not entitled “Guidelines” and the current title reflects its hybrid nature, which must balance the difficult task of advancing new thinking while operating within the legal limitations imposed on the Commission.<sup>24</sup>

Whether the Guidance could create legitimate expectations has given rise to another debate among commentators.<sup>25</sup> Within this context, Gormsen states that by naming the Guidance as enforcement priorities, the Commission has tried to avoid creating legitimate expectations but the Guidance still creates legitimate expectations as to how the Commission will apply Art.102 in conjunction with the case law which supports a different interpretation.<sup>26</sup> Blanco and Colomo claim that legal counsel of dominant firms can be expected to cite the Guidance on a regular basis as a valuable tool reflecting mainstream thinking.<sup>27</sup> On the other hand, Kellerbauer argues that the Guidance cannot give rise to legitimate expectations as it does not assure dominant firms that their conduct would go unpunished, if it did not fall under the enforcement priorities.<sup>28</sup>

The third and the last group of criticisms is levelled against the overall substantive content of the Guidance and the rigour of the analysis it makes. Commentators in this respect have criticised the Commission for not fully embracing the effects-based approach with a consumer welfare standard, thereby creating ambiguity in practice. Korah argues that

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<sup>23</sup> Whish, R. and Bailey, D. (2012) *Competition Law*, 7<sup>th</sup> Edition, OUP, Great Britain, p.176.

<sup>24</sup> Ezrachi (2009), p.64.

<sup>25</sup> For a discussion of legitimate expectations see *infra* “4.1.2. Increasing Legal Certainty and Ensuring Compliance”.

<sup>26</sup> Gormsen (2010b), p.51.

<sup>27</sup> Blanco, L. O. and Colomo, P. I. (2011) “Evolving Priorities and Rising Standards: Spanish Law on Abuse of Market Power in the Light of the 2008 Guidance Paper on Article 82 EC”, in Pace, L. F. (ed.), *European Competition Law: The Impact of the Commission’s Guidance on Article 102*, Edward Elgar Publishing, Great Britain, p.102.

<sup>28</sup> Kellerbauer, M. (2010) ‘The Commission’s New Enforcement Priorities in Applying Article 82 EC to Dominant Companies’ Exclusionary Conduct: A Shift Towards a More Economic Approach?’, *European Competition Law Review*, 31(5), p.185.

the Guidance does not decide whether efficiency (meaning consumer welfare) or the Ordoliberal notion of economic freedom with a special responsibility is the predominant function of competition.<sup>29</sup> The author contends that more than one drafter has contributed to the Guidance as there are many references to efficiency and consumer benefit, but equally there are important references to the special responsibility as well. Similarly, Blanco and Colomo doubt whether the effects-based rules proposed in the Guidance represent a meaningful improvement on the status quo.<sup>30</sup>

According to McMahon, while professing to shift towards a more economic approach and consumer welfare, the Guidance did not establish standards which are consistent with those terms as understood in US antitrust law or in traditional economic theories of competition law.<sup>31</sup> Likewise, Petit puts forward that while the Guidance marks a welcome economic sophistication of the Commission's Art.102 enforcement policy, it nonetheless often fails to go beneath the surface of modern antitrust economics and thus provide only limited guidance to firms and their counsel.<sup>32</sup> O'Donoghue and Padilla assert that the Guidance is a welcome development in the sense that it recognises mere harm to rivals as the hallmark of competition, but there is very little articulation in the Guidance of what distinguishes legitimate competition from abusive conduct.<sup>33</sup> Lastly, Witt claims that the Guidance is less assertive and far-reaching than the preceding soft law on Art.101 TFEU and merger control, and its theoretical remarks are not stringently welfare-based.<sup>34</sup>

In the view of this author, the Guidance is intended to bring the interpretation of Art.102 into line with the consumer welfare objective and to show Commission's willingness to switch to an economics-based approach or, at the very least, give something

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<sup>29</sup> Korah, V. (2011) "Guidance on the Commission's Enforcement Priorities in Applying Article 82 to Abusive Exclusionary Conduct by Dominant Undertakings: From Protecting Freedom to Enter a Market to an Efficient Allocation of Resources to Increase Consumer Welfare", in Pace, L. F. (ed.), *European Competition Law: The Impact of the Commission's Guidance on Article 102*, Edward Elgar Publishing, Great Britain, p.23-24.

<sup>30</sup> Blanco and Colomo (2011), p.77.

<sup>31</sup> McMahon, K. (2009) "A Reformed Approach to Article 82 and the Special Responsibility Not to Distort Competition", in Ezrachi, A. (ed.), *Article 82 EC: Reflections on Its Recent Evolution*, Hart Publishing, United Kingdom, p.142.

<sup>32</sup> Petit, N. (2009) 'From Formalism to Effects? The Commission's Communication on Enforcement Priorities in Applying Article 82 EC', *World Competition*, 32(4), p.485.

<sup>33</sup> O'Donoghue and Padilla (2013), p.245.

<sup>34</sup> Witt (2010), p.235.

concrete for the proponents of the modernisation of Art.102 after the modernisation of the other two pillars of EU competition law. The Discussion Paper was a welcome development, but it was just a staff working paper. As the replies to the public consultation for the Discussion Paper show, a more formal document was hugely expected by the academia,<sup>35</sup> businesses,<sup>36</sup> as well as their advisers.<sup>37</sup> In the absence of a formal document, the modernisation attempts would have been futile. Partly for those reasons, the Commission was under pressure to issue a formal document, one that would be in line with modern economic thinking in the area of unilateral conduct.

However, the Courts' case law differed on many points with the Commission's new guiding principles and this fact tied the Commission's hands. Adopting Guidelines on Art.102 was a dead-end: Guidelines offer an interpretation of law by an enforcer authority and cannot offer beyond what the courts have ruled.<sup>38</sup> However, the Commission was clever: In order to operationalise the effects-based approach with the consumer welfare standard, the Commission resorted to its prosecutorial discretion. Since setting priorities was an 'inherent feature of administrative activity',<sup>39</sup> the Commission found the solution by setting out its enforcement priorities in a document which it calls a "Guidance". Consequently, the formal document was issued as "Guidance on the Commission's enforcement priorities" rather than "Guidelines on Art.102".

## **3.2. Contributions of the Guidance to the Enforcement of Art.102**

### **3.2.1. Anti-competitive Foreclosure**

Section III, Subsection B of the Guidance deals with the concept of "anti-competitive foreclosure" which is at the heart of the document and the foremost contribution of the

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<sup>35</sup> See Competition Law Forum's response ('The Competition Law Forum urges the European Commission to issue Guidelines on Abuse of Dominance.'). Available at <http://ec.europa.eu/competition/antitrust/art82/054.pdf> [accessed 30/09/2014].

<sup>36</sup> See Vodafone's response ('Vodafone urges the Commission to continue the important work begun by the Discussion Paper and publish Guidelines as soon as possible.'). Available at <http://ec.europa.eu/competition/antitrust/art82/067.pdf> [accessed 30/09/2014].

<sup>37</sup> See Baker and McKenzie LLP's response ('We recommend that the Commission give a strong, positive statement, that its guidelines reflect economic best practice... and that the guidelines will form the basis of its enforcement policy under Article [102].'). Available at <http://ec.europa.eu/competition/antitrust/art82/076.pdf> [accessed 30/09/2014].

<sup>38</sup> See *infra* "4.1. Guidelines as Soft Law Instruments: The Functions of Guidelines".

<sup>39</sup> Case T-24/90 *Automec Srl v Commission* [1992] ECR II-2223, para.77.

Guidance to the enforcement of Art.102. Para.19 begins by stating that the aim of the Commission's enforcement in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare. It continues to define as to what is meant by "anti-competitive foreclosure" as 'a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.'

Normally, foreclosure is a generic term used in the context of exclusionary abuses in case law. However, the insertion of the adjective "anti-competitive" implies that the Guidance distinguishes between anti-competitive foreclosure and "normal" or "lawful foreclosure".<sup>40</sup> In both cases, actual or potential competitors of a dominant firm are excluded or eliminated from the relevant market; however, such exclusion or elimination harms consumers only in the context of anti-competitive foreclosure. This is because normal or lawful foreclosure is considered to only lead to harm to competitors. Foreclosure which does not harm consumers is thus permitted. It appears that the Commission adopts this concept as the standard for its intervention. The focus of the Commission's analysis will be on cases where the conduct causes consumer harm. This is in line with the consumer welfare objective.

Some commentators find the relationship between foreclosure and consumer harm unclear. One commentator asserts that the expression "thus having an adverse impact on consumer welfare" being placed after "anti-competitive foreclosure" in para.19<sup>41</sup> is equivocal: It could mean either that the Commission has to show likely adverse effect on consumer welfare in order to identify an abuse or that the adverse impact on consumers is the expected consequence of anti-competitive foreclosure.<sup>42</sup> The Guidance is argued to be not clear enough on 'perhaps the most crucial issue regarding the enforcement of Article

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<sup>40</sup> Which calls the latter "mere foreclosure" and argues that this occurs where the dominant firm wins business as a result of its superior efficiency. Whish (2011), p.156.

<sup>41</sup> A similar expression can be found in para.27 as well ('...conduct is not likely to have an adverse impact on effective competition, and *thus* on consumers...') (emphasis added).

<sup>42</sup> Akman, P. (2010) 'The European Commission's Guidance on Article 102 TFEU: From Inferno to Paradiso?', *The Modern Law Review*, 73(4), p.614.

102 TFEU, namely the basis on which a practice is to be found abusive.’<sup>43</sup> Indeed, if harm to consumers is the expected consequence of anti-competitive foreclosure, then consumer harm would still be assumed from exclusion and the Guidance would not have improved the status quo.

Having defined the concept of anti-competitive foreclosure in para.19, the Commission states in para.20 that it will normally intervene under Art.102 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to such foreclosure. The following seven factors are considered by the Guidance to be generally relevant to the assessment of anti-competitive foreclosure (para.20):

- i. The position of the dominant undertaking,
- ii. The conditions on the relevant market,
- iii. The position of the dominant undertaking's competitors,
- iv. The position of the customers or input suppliers,
- v. The extent of the allegedly abusive conduct,
- vi. Possible evidence of actual foreclosure, and
- vii. Direct evidence of any exclusionary strategy.

Many of those seven factors are directly related to the analysis of foreclosure and will help the Commission to determine the effects of conduct in accordance with the effects-based approach it attempts to adopt. It appears that para.20 is concerned with the foreclosure element of “anti-competitive” foreclosure, rather than the consumer harm element. This is because those seven factors are concerned with the structure of the market and the motivation of a dominant firm, and are not related to the proof of consumer harm.<sup>44</sup> For instance, explaining the first factor, the Commission states that the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure (para.19). This is hardly relevant for the existence of consumer harm. Likewise, the finding of direct evidence of exclusionary strategy can be useful in proving foreclosure, but not consumer harm.

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<sup>43</sup> *ibid.*

<sup>44</sup> See Geradin (2010), p.42 (‘[N]one of these factors relate to the assessment of the presence of consumer welfare, which is again quite surprising considering the emphasis placed on consumer harm in the definition of anti-competitive foreclosure...’).

In comparison to a long paragraph on foreclosure, the Guidance includes only one sentence on consumer harm: The identification of *likely consumer harm* can rely on qualitative and, *where possible and appropriate*, quantitative evidence (para.19). One could argue that the proof of consumer harm, which is the underlying reason of adopting the consumer welfare objective at the expense of the Ordoliberal philosophy, is not paid enough attention. The Guidance hardly requires proof of actual consumer harm and finds the proof likely” consumer harm sufficient.<sup>45</sup> Throughout the Guidance, there is a self-referencing circularity of argument that assumes that likely foreclosure, which appears to be sufficient, will be likely to harm consumers, and therefore no separate proof of any likely harm to consumers is required.<sup>46</sup>

To conclude, the concept of anti-competitive foreclosure is the foremost contribution of the Guidance to the enforcement of Art.102. It is intended to mirror the consumer welfare-oriented spirit of the modernisation and requires the proof of consumer harm in order for conduct to amount to an abuse. Because this concept does not exist in the case law of the EU Courts, at least not in the sense of the Guidance, the Guidance carefully notes that establishing anti-competitive foreclosure is “the Commission’s enforcement activity” (para.19). Although the distinguishing feature of this concept stands out as consumer harm, the Guidance in fact is mostly silent on the proof of consumer harm, but is more concerned with the structural factors in establishing that foreclosure. Placing the emphasis on structural factors and turning a blind eye to consumer harm obviously sits at odds with the real purpose of the Guidance, as well as with the spirit of the modernisation.

### 3.2.2. The “As Efficient Competitor” Test

One of the most notable contributions of the Guidance to the enforcement of Art.102 is the adoption of the “as efficient competitor” test for as the standard for intervention to price-

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<sup>45</sup> See Petit (2009), p.496 (‘[T]he Commission’s Guidance places a lesser emphasis [compared to foreclosure of the market] on the factors that should be taken into account to demonstrate a likely “consumer harm”.’) and Nazzini, R. (2011) *The Foundations of European Union Competition Law: The Objective and Principles of Article 102*, OUP, United Kingdom, p.398 (‘A careful reading of the Guidance reveals that the likely consumer harm test is little more than a prediction of consumer harm based on structural indicators that are already relevant to the finding of dominance or to the assessment of the foreclosure.’).

<sup>46</sup> Marsden, P. (2010b) “Some Outstanding Issues from the European Commission’s Guidance on Article 102 TFEU: Not-so-faint Echoes of Ordoliberalism”, in Etro, F. and Kokkoris, I. (eds.), *Competition Law and the Enforcement of Article 102*, OUP, Great Britain, p.56.



based exclusionary conduct. According to the Guidance, in order to prevent anti-competitive foreclosure, the Commission will normally intervene where the conduct in question is capable of hampering competition from competitors which are considered to be as efficient as the dominant firm (para.23). In other words, in the context of price-based exclusionary conduct, anti-competitive foreclosure occurs only where an “as efficient competitor” is excluded from the market. If an “as efficient competitor” can compete effectively with the price-based conduct of the dominant firm, the Commission will infer that such conduct is unlikely to have an adverse impact on effective competition and thus on consumers (para.27). The trails of this test can be found in some early judgments of the EU Courts;<sup>47</sup> however, with the Guidance, it is envisaged as the standard test for assessing price-based exclusionary conduct.

The idea that the exclusion of “as efficient competitors” can be used to prove the required standard of harm constitutes the starting point of this test. Under this test, conduct amounts to an abuse, if it is likely to exclude from the market an equally (or more) efficient competitor of a dominant firm. The rationale is that all exclusionary practices lead to foreclosure of the market to competitors, but the abusive exclusionary conduct is the one that leads to exclusion of “as efficient competitors”. If there is effective competition in a given market, more efficient firms will gain at the expense of less efficient ones, so the test appears to accord with protecting competition as distinct from the protection of competitors.<sup>48</sup> Protection of less efficient competitors is deemed as detrimental to consumers for the loss of efficiency they would generate and foreclosure of less efficient competitors is generally unlikely to have harmful effects on consumers.<sup>49</sup> Some commentators, however, have criticised this test for not actually taking into account consumer harm.<sup>50</sup>

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<sup>47</sup> See, for example, Case 62/86 *AKZO Chemie v Commission* [1991] ECR I-3359, para.72 (‘...prices below average total costs... can drive from the market undertakings which are perhaps *as efficient as* the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.’) (emphasis added).

<sup>48</sup> Vickers, J. (2005) ‘Abuse of Market Power’, *The Economic Journal*, 115(504), p.F256.

<sup>49</sup> Lowe, P. (2009) ‘The European Commission Formulates its Enforcement Priorities as Regards Exclusionary Conduct by Dominant Undertakings’, *Global Competition Policy*, Feb-09 (1), p.7.

<sup>50</sup> See CLF (2006) ‘The Reform of Article 82: Comments on the DG-Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuses’, *European Competition Journal*, 2(1), p.174 (‘Reliance on a pass/fail “as efficient competitor” test, without consideration of the way in which consumers will ultimately

On the other hand, the Guidance also notes in para.24 that a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure. This paragraph is a departure from the “as efficient competitor” test laid down in para.23, and protects the exclusion of less efficient (or more likely, not yet as efficient) competitors in certain circumstances. This is hardly surprising given the fundamental premise of the test which presumes that less efficient competitors are generally not capable of stimulating competition in the market. However, it is possible for not yet as efficient competitors to become efficient in the short- or long-run. This is more likely the case when such firms have recently entered the market and are yet to become as efficient. This departure from the “as efficient competitor” test has been both criticised<sup>51</sup> and supported.<sup>52</sup>

To conclude, the “as efficient competitor” test is a departure from automatically inferring harmful effects and added ‘an extra layer of scrutiny’ compared to the form-based approach.<sup>53</sup> The Guidance adopts this test as the standard by which pricing abuses are assessed; non-pricing abuses are not subject to this test. The test is generally helpful in protecting competition, instead of competitors; however, its impact on consumers is equivocal. Normally the test only protects as efficient competitors, but the Guidance is clear that under certain circumstances, the protection of not yet as efficient competitors will also be taken into account. This case-by-case approach inevitably creates uncertainty for dominant firms and therefore makes the Guidance a less reliable tool, but on the other hand such an exemption might be useful in some cases where specific facts of the case in question might justify the protection of not yet as efficient competitors vis-à-vis the pricing conduct of dominant undertakings.

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be harmed places excessive reliance on uncertain modelling approaches, is too simplistic and is likely to lead to over-intervention.’) and Korah, V. (2007) *An Introductory Guide to EC Competition Law and Practice*, 9<sup>th</sup> Edition, Hart Publishing, Great Britain, p.141 (‘[T]he main concern of such test seems to be the impact of a particular conduct may have on [a dominant firm’s] competitors rather than on consumer welfare.’).

<sup>51</sup> Ridyard argues that the Commission presupposes that in some circumstances an inefficient competitor may be better for competition and consumers than no competitors at all, and criticises this exemption as it blurs the fundamental principle of the test. Ridyard (2009), p.233.

<sup>52</sup> Fjell, K. and Sørsgard, L. (2006) ‘How to Test For Abuse of Dominance?’, *European Competition Journal*, 2 (Special Issue), p.71 (‘[A] pure “as efficient” competitor test would lead to some false positives by always allowing the dominant firm to exclude less efficient rivals – even if it would harm consumers.’).

<sup>53</sup> Gormsen, L. L. (2003) ‘Are Anti-competitive Effects Necessary for an Analysis under Article 102 TFEU?’, *World Competition*, 36(2), p.244.

### 3.2.3. Efficiency Defence

Another contribution of the Guidance to the enforcement of Art.102 is the special emphasis placed on the dominant firm's "efficiency defence" in the assessment of exclusionary conduct. The Guidance states that the Commission will take into account claims put forward by a dominant firm that its conduct is objectively justified, indispensable and proportionate to the goal it pursues (para.28). The Guidance lists two ways as to how a dominant firm can avail itself of this objective justification: By either demonstrating that the conduct in question is "objectively necessary" *or* proving that the conduct produces substantial "efficiencies" outweighing its anti-competitive effects on consumers, which is commonly known as the "efficiency defence". Therefore, a dominant firm may benefit from two different types of justification. In addition to the general factors stated in paras.28-31, the Guidance envisages some additional factors on efficiencies in the sections dealing with specific forms of conduct.<sup>54</sup>

Para.29 provides more details on the first option, "objective necessity". Accordingly, conduct may be considered objectively necessary, for example for health or safety reasons related to the nature of product in question; however, this will be determined on the basis of factors external to the dominant firm. It is normally the task of public authorities to set and enforce public health or safety standards and for this reason, a dominant firm is not allowed to take steps on its own initiative to exclude products which it regards as dangerous or inferior to its own product (para.29). Objective necessity as a justification for allegedly abusive conduct is already envisaged in the case law. There are cases where a dominant firm's argument on objective necessity was in fact not disputed,<sup>55</sup> but was rejected on the merits, as well as cases where the allegedly abusive conduct was in fact objectively justified.<sup>56</sup> The Guidance reiterates the existing judgments in this respect.

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<sup>54</sup> See Guidance, paras.46, 62, 74, 89 and 90.

<sup>55</sup> Case T-30/89 *Hilti v Commission* [1991] ECR II-1439 and Case T-83/91 *Tetra Pak International v Commission* [1994] ECR II-755.

<sup>56</sup> See Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV and others v Commission* [1978] ECR 1513 where the CJEU annulled the decision of the Commission which found that it was an abuse for the dominant firm in question to restrict supplies to one of its customers and thus to apply less favourable treatment than what is reserved for its traditional customers. The Court held that the restriction of supply was 'limited by reason in particular of the general scarcity of products' during the oil crisis and the conduct was thus objectively justified.

With regard to the second option, it has been widely argued that historically, efficiencies have not played a significant role under Art.102.<sup>57</sup> The efficiency arguments were often rejected<sup>58</sup> and it was stressed that the Treaty did not provide an exemption clause in the context Art.102, as it did under Art.101(3) TFEU.<sup>59</sup> In the landmark *British Airways* judgment where the dominant firm's argument on efficiency was discussed (but not upheld), the CJEU referred to '*objective economic justification*' and examined whether anti-competitive effects of the allegedly abusive conduct may be counterbalanced by 'advantages in terms of efficiency'.<sup>60</sup> Accordingly, if anti-competitive effects bear no relation to 'advantages for the market and consumers' or go beyond what is necessary in order to attain those advantages, that conduct must be regarded as an abuse.<sup>61</sup> Evidently, the efficiency defence envisaged in this judgment calls for a balancing test, under which anti-competitive effects of the conduct should be counterbalanced by the efficiencies generated.

By contrast, the efficiency defence envisaged in the Guidance appears to be more sophisticated than the one in *British Airways* and its conditions are stricter as well. Pursuant to para.30 of the Guidance, a dominant firm may justify its conduct which leads to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise. For a successful efficiency defence, the following conditions must be cumulatively met: (i) efficiencies have been, or likely to be, realised as a result of the conduct concerned, (ii) the conduct is indispensable to the realisation of those efficiencies, (iii) the efficiencies brought about by conduct outweigh anti-competitive effects and (iv) effective competition in respect of a substantial part of the

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<sup>57</sup> Bellis, J. F. and Kasten, T. (2010) "Will Efficiencies Play an Increasingly Important Role in the Assessment of Conduct Under Article 102?", in Etro, F. and Kokkoris, I. (eds.), *Competition Law and the Enforcement of Article 102*, OUP, Great Britain, p.130. See also Motta, M. (2009) 'The European Commission's Guidance Communication on Article 82', *European Competition Law Review*, 30(12), p.598 ('...case law in Europe has so far disregarded efficiency defences in abuse of dominance cases.') and O'Donoghue and Padilla (2013), p.236 ('The reality is that efficiency defences have rarely if ever succeeded under Article 102 TFEU...').

<sup>58</sup> See, for example, Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, paras.89-90 and Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, para.1151.

<sup>59</sup> See Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line AB and Others v Commission* [2003] ECR II-3275, para.1112 ('However, because Article [102] does not provide for any exemption, abusive practices are prohibited regardless of the advantages which may accrue to the perpetrators of such practices or to third parties.') and Case T-51/89 *Tetra Pak v Commission* [1990] ECR II-309, para.25 ('[Article 102] by reason of its very subject-matter (abuse), precludes any possible exception to the prohibition it lays down...').

<sup>60</sup> Case C-95/04 *British Airways v Commission* [2007] ECR I-2331, para.86.

<sup>61</sup> *ibid.* See also Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-0527, para.76.

products concerned is not eliminated. The evidentiary burden of proof is on the dominant firm (para.31).<sup>62</sup>

The Commission's recognition of the efficiency defence in the Guidance is in line with the effects-based approach and is a movement away from a formalistic assessment of abusive conduct. It allows dominant firms to bring to the table the efficiencies that result from their conduct in order to justify what may otherwise constitute an abuse.<sup>63</sup> This is crucial because most conduct that leads to foreclosure also generates some efficiency gains. In practice, it is difficult to find any behaviour which does not present a number of efficiencies and whether the behaviour amounts to an abuse or not depends, therefore, greatly on its possible foreclosure effect on the market to its real efficiency.<sup>64</sup> Recognition of the efficiency defence under Art.102 also brings this Article more into line with the efficiency-oriented enforcement of Art.101(3) TFEU, as well as to ensure the coherence of EU competition law.<sup>65</sup>

Some commentators expressed their dissatisfaction with the role and conditions of the efficiency defence in the Guidance, though they raised no objections to the defence itself. Bellis and Kasten claim that efficiencies are unlikely to play a significant factor in the outcome of future cases since a dominant firm will still effectively need to defend itself against the Commission's finding that it has engaged in conduct harmful to consumers.<sup>66</sup> The authors regard this as a 'task that has historically proven to be next to impossible'.<sup>67</sup> They observe that while anti-competitive effects can be presumed without any supporting quantitative evidence, efficiencies are subject to a cumulative four-part test, each part of

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<sup>62</sup> It has been argued that the Guidance formulated a new test which differed from the test established in the case law, possibly for achieving consistency with the approach adopted under Art.101(3) TFEU. Nazzini (2011), p.305. The author also claims that in contrast to the *British Airways* judgment, the Guidance raised the bar for dominant firms to substantiate an efficiency defence. *ibid* at p.323.

<sup>63</sup> Monti, G. (2007) *EC Competition Law*, CUP, United Kingdom, p.208.

<sup>64</sup> Waelbroeck, D. (2010) "The Assessment of Efficiencies under Article 102 and the Commission's Guidance Paper", in Etro, F. and Kokkoris, I. (eds.), *Competition Law and the Enforcement of Article 102*, OUP, Great Britain, p.119.

<sup>65</sup> Cf. Pace (2011), p.114 as the author claims that by articulating such a defence in the Guidance, the Commission inserted an "Art.102(3)" into the Treaty which was against the "monophasic" nature of the Article itself.

<sup>66</sup> Bellis and Kasten (2010), p.136. Motta also argues that in practice, the onus of proving efficiencies is shifted too soon to the dominant firm. Motta (2009), p.598.

<sup>67</sup> Bellis and Kasten (2010), p.136.

which must be established with a sufficient degree of probability and on the basis of verifiable evidence.

In conclusion, the consideration of efficiencies is an essential part of an effects-based approach<sup>68</sup> and the Guidance clearly permits them as a defence. In order for an efficiency defence to be successful, a dominant firm must demonstrate that efficiencies are likely to be realised as a result of the conduct which is indispensable to their realisation and outweigh any likely negative effects on competition and consumer welfare in the affected markets, and finally the conduct must not eliminate effective competition. Although the recognition of the efficiency defence is in line with the effects-based approach, the conditions set forth in the Guidance seem difficult to be cumulatively met. Despite the fact that the EU Courts have so far appeared rather reluctant to dominant firms escaping liability on the basis of efficiencies once their conduct excludes competitors, the efficiency defence is still rooted in the case law. Whether the EU Courts would adopt the conditions set forth in the Guidance or simply rely on the earlier *British Airways* judgment remains to be seen.

### **3.2.4. Detailed Assessments on Specific Forms of Abusive Exclusionary Conduct**

The Guidance is the first formal document which contains extensive analyses of specific forms of abusive conduct in the enforcement of Art.102 available to all sectors of the economy.<sup>69</sup> After the sections on the assessment of market power and the general approach to exclusionary conduct, the Guidance provides more detail on the assessment of some individual examples of exclusionary conduct, namely exclusive dealing (paras.32-46) tying and bundling (paras.47-62) predation (paras.63-74) and refusal to supply and margin squeeze (paras.75-90). The Guidance makes it clear beforehand that the Commission will develop the analysis of the general factors mentioned in para.20, *together with* the more

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<sup>68</sup> See Lowe (2009), p.4-5 ('[I]t would be difficult to apply an effects-based approach and effectively protect consumers, without taking efficiencies into account.').

<sup>69</sup> Before the modernisation, little guidance on specific forms of abusive conduct was available in Notice on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services [1998] OJ C39/2 and Notice on the application of the competition rules to access agreements in the telecommunications sector [1998] OJ C265/02. Both of these Notices are sector-specific; their subject matters are related to how some selected forms of abuse may take place in the relevant sector. This highlights the significance of the Guidance as a new form of policy document in the enforcement of Art.102 offering extensive guidance on different types of abusive conduct in a non-sector-specific way.

specific factors described under the context of these specific forms of conduct and any other factors which it may consider to be appropriate (para.21).

The Guidance does not analyse all types of exclusionary conduct which may fall within the scope of Art.102. Instead, it focuses on the abovementioned forms of conduct and explains that they appear to be ‘*the most common*’ types of exclusionary conduct based on the Commission’s experience (para.7).<sup>70</sup> By including such a section, the Guidance implies that the specific forms of conduct in question are therefore potentially abusive under Art.102. It may well mean that the Commission will spend its limited resources more on these types of conduct *vis-à-vis* others and there will be even more decisions on them in the future enforcement of Art.102. This has been criticised by Temple Lang who insists that the Guidance discusses only ‘well-recognised kinds of exclusionary abuse’, and does nothing to help to deal with ‘new or unusual kinds of conduct, for which guidance would be most needed’.<sup>71</sup>

It is noteworthy that nearly two-thirds of the length of the Guidance is devoted to the analysis of specific forms of conduct. Only four paragraphs are on the general approach to exclusionary conduct (paras.19-22), whereas 59 paragraphs deal with specific forms of conduct (paras.32-90). As discussed in Chapter 1, rather than enumerating specific forms of conduct that constitute an abuse, the text of Art.102 specifies some general illustrative patterns of abusive conduct such as imposing unfair prices, limiting production or applying dissimilar conditions. Although the approach in the Guidance may thus seem methodologically wrong, it is in fact normal and a common practice to analyse specific forms of conduct. This is because the discussion and management of Art.102 cases are organised by categories of conduct,<sup>72</sup> and it can be observed that some forms of conduct have come to the fore based on their frequency in practice. It has been argued that soft law

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<sup>70</sup> Similarly, the Press Release of the Commission on the Guidance uses the term ‘*the most commonly encountered forms of exclusionary conduct*’ on this point. Press Release, “Antitrust: Consumer welfare at heart of Commission fight against abuses by dominant undertakings”, IP/08/1877, Brussels, 3 December 2008.

<sup>71</sup> Temple Lang, J. (2009) “Article 82 EC - The Problems and the Solution”, FEEM Working Paper, Paper No.65.2009, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1467747](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467747)> [accessed 30/09/2014], p.6. See also O’Donoghue and Padilla (2013), p.83 (‘[T]he Guidance Paper is more or less silent on new types of abuses... [there are] a number of important abuses where the Commission’s position has not been articulated.’).

<sup>72</sup> EAGCP Report, para.5.

instruments should give examples of practices that are potentially more harmful than other kinds of practices.<sup>73</sup>

Another reason for the inclusion of a section on the specific forms of conduct in the Guidance may be due to the fact that no single overarching economic or legal test, which can be successfully and consistently used to analyse all types of abusive conduct, has been developed so far.<sup>74</sup> Instead there are particular tests for particular types of conduct, each having its strengths and weaknesses.<sup>75</sup> The Guidance first introduces the concept of anti-competitive foreclosure and factors that are relevant to the general assessment, then discusses in depth particular issues which are relevant in the context of the specific form of conduct in question. Therefore, the Guidance provides some conduct-specific tests and criteria<sup>76</sup> and notes that they should nevertheless be interpreted within the general framework. This is mostly in line with the prevailing opinion in the literature that within an overall coherent framework, different operational tests can be used provided that there are no major differences in the treatment of practices leading to similar economic outcomes.<sup>77</sup>

In the view of this author, in addition to those reasons, the fundamental reason is to clearly show some examples, like a case study, with a view to demonstrating how the Commission will apply its new effects-based approach in future cases. By articulating some economic analysis which takes into account the effects of conduct, the Commission would be able to prove that it has switched to an effects-based approach into Art.102 and abandoned its formalistic thinking. The rigour of the Commission's economic analysis on those specific forms (most noticeable in the context of rebates)<sup>78</sup> can be an indication of its commitment to apply an effects-based approach in practice, which was increasingly expected from the Commission with the modernisation. After all, it would not have been

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<sup>73</sup> OECD (2005) Competition on the Merits, OECD Policy Roundtables, DAF/COMP(2005)27, <<http://www.oecd.org/dataoecd/7/13/35911017.pdf>> [accessed 30/09/2014], p.190.

<sup>74</sup> See Nazzini (2011), p.52 ('It is clear that no single abuse test could be suitable for application to all conceivable abusive practices by dominant firms.').

<sup>75</sup> For an overview of the main tests see O'Donoghue and Padilla (2013), p.227-237 and OECD (2005), p.24-36.

<sup>76</sup> It appears that the Guidance proposes the "as efficient competitor" test for conditional rebates and pricing abuses in general, the "profit sacrifice" test for predation and the "consumer harm" test for refusal to deal and margin squeeze.

<sup>77</sup> Özkan, A. F. (2012) 'Publication Review: The Foundations of European Union Competition Law: The Objective and Principles of Article 102', *European Competition Law Review*, 33(7), p.332.

<sup>78</sup> See Guidance, paras.37-46.



convincing, if the Guidance had shown a mere statement of the Commission to adopt an economics-based approach in one single paragraph without attaching any evidence as to how this could be done in practice.

Consequently, the Guidance provides additional guidance on some specific forms of conduct which are the most common categories of potentially abusive conduct. This is a pragmatic approach taken by the Commission which produced detailed guidance on the framework of analysis that will be applied to some categories of exclusionary conduct. While this aims to ensure a high level of certainty and obviously benefits dominant firms, it is arguable whether the emphasis placed on those types of conduct undermines the practical importance of other types of potentially abusive conduct. It appears that these types of conduct in the Guidance are considered as the highest enforcement priorities of the Commission. In sharp contrast, as Section 3.3 will show immediately below, the post-Guidance period has mainly dealt with other types of conduct rather than the ones specifically mentioned in the Guidance.

### **3.3. The Enforcement of Art.102 in the Post-Guidance Period**

#### **3.3.1. Initial Expectations from the Post-Guidance Period**

The enforcement of Art.102 in the post-Guidance period was one of the most questioned issues in the context of Art.102 in EU competition law. Since the Guidance departed from the established case law, it was not quite predictable whether it would be complied with in practice. There were doubts as to whether the Commission itself would abide by its own Guidance and shape its future decisions in accordance with the consumer welfare and efficiency considerations in the Guidance, whether the EU Courts would endorse the new principles in the Guidance or instead follow their old formalistic case law, and finally whether the national competition authorities (NCA) and national courts (NC) would align their enforcement with the Guidance and make more use of the Guidance in shaping their decisions and judgments on Art.102.

From the position of the Commission, after its long endeavours, it was normally expected that it would abide by its enforcement priorities it set out in the Guidance. However, there was a risk that the Guidance might not be complied with given the practical

difficulties in applying the effects-based approach. It is true that the effects-based approach as encapsulated in the Guidance was undeniably more demanding than the easy form-based option and also more resource-intensive from an institutional standpoint.<sup>79</sup> If the Commission was to adopt its decisions based on the principles of the Guidance, it would have to examine effects of the conduct and weigh them against possible efficiencies the conduct creates so as to prove that the conduct leads to anti-competitive foreclosure. Such analysis might have to require complex economic and econometric evidence, and might complicate its decision making.

By contrast, if the Commission based its decisions on the established case law, which was far less concerned with the proof of effects, it would not have to deal with whether conduct generates anti-competitive effects on consumers. This might be tempting in particular where the Commission did not have a strong case against a dominant firm.<sup>80</sup> By cutting down on economic analysis, it could save its limited resources for other cases and achieve a swift decision-making. Most importantly, given the state of the established case law, its decisions could have a high chance of being upheld by the EU Courts on appeal in the event that the Commission placed itself more into line with the case law than with the Guidance. On this point, Geradin contends that the Commission might be tempted to ‘opportunistically deviate’ from its effects-based approach to make its decision *de facto* ‘appeal proof’, since in any event the case could be easily won on the basis of the formalistic case law.<sup>81</sup>

The EU Court’s stance towards the Guidance was of utmost importance as the fate of the Guidance depended on its approval or rejection by the EU Courts. As discussed in Chapter 2, most of the past judgments of the EU Courts were often based on more traditional legal rules rather than economic assessments, and not concerned too much with effects on consumers or efficiency considerations. In fact, many of the strikingly formalistic judgments were handed down while the modernisation was ongoing.<sup>82</sup> In one of those

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<sup>79</sup> Petit (2009), p.499.

<sup>80</sup> See *ibid* (‘[I]t cannot be excluded that the Commission will revert to the forms-based approach should the approach advocated in the [Guidance] prove overly burdensome in terms of administrative resources.’).

<sup>81</sup> Geradin (2010), p.50-51.

<sup>82</sup> Case T-340/03 *France Télécom SA v Commission* [2007] ECR II-0107; Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601; and Case C-95/04 *British Airways v Commission* [2007] ECR I-2331.

judgments, AG Kokott even warned the Commission that even if its administrative practices were to change, it would still have to act within the framework prescribed for it by Art.102 as interpreted by the CJEU.<sup>83</sup> It was widely argued that the Guidance was not binding on the EU Courts and any possibility of change depended on the Commission obtaining endorsement of its new approach from the EU Courts.<sup>84</sup>

Although the Guidance was primarily related to the Commission's own enforcement in dealing with the complaints, gradual endorsement of the Commission decisions based on the orientations in the Guidance would likely to result in a change in the objective of Art.102, which might not be easy *vis-à-vis* the other objectives in the established case law. Therefore, the future of the Guidance depended on whether the EU Courts would understand the tension between the more economic and seemingly better propositions in the Guidance and the legal rules they once created in their previous judgments which no longer appeared to reflect the advances in the modern economic thinking on unilateral conduct. Since the existing judgments in the case law are not binding on the CJEU or on the GCEU,<sup>85</sup> the EU Courts could technically reconsider their old formalistic judgments in later cases and thus uphold the Commission's new orientations in the Guidance, but it was also noted that the CJEU rarely departs from its earlier judgments in practice.<sup>86</sup>

As NCAs and NCs are empowered to enforce Art.102 under Regulation 1/2003<sup>87</sup> and the Guidance aimed to reorient the enforcement of this Article, the future of the Guidance would have an impact on them as well. Considering the Commission's overall experience with Art.102, the Guidance was expected to provide a useful point of reference

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<sup>83</sup> Opinion of AG Kokott in Case C-95/04 *British Airways v Commission* [2007] ECR I-2331, para.28. See also Opinion of AG Kokott in Case C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para.29 ('[C]ommunications from the Commission are not legally binding and, therefore, are incapable of anticipating interpretation by the Court...').

<sup>84</sup> Goyder, J. and Albors-Llorens, A. (2009) *EC Competition Law*, 5<sup>th</sup> Edition, OUP, Great Britain, p.650.

<sup>85</sup> Under EU law, there is no doctrine of binding precedent, meaning that the EU Courts are not bound by the precedent established in their prior judgments.

<sup>86</sup> Rousseva, E. (2010) *Rethinking Exclusionary Abuses in EU Competition Law*, Hart Publishing, Great Britain, p.53-54.

<sup>87</sup> Regulation 1/2003 grants NCAs and NCs the power to apply Art.101 TFEU and Art.102 in individual cases. Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1. Pursuant to Art.3(1), where NCAs or NCs apply national competition law to any abuse prohibited by Art.102, they shall also apply Art.102.

for NCAs in formulating their decisions on Art.102. It was argued that NCAs might be inclined to take their lead from the Commission, notwithstanding the established jurisprudence, as a result of their participation with the Commission in the European Competition Network.<sup>88</sup> In addition, under Art.16 Regulation 1/2003, NCAs and NCs are not allowed to take decisions running counter to the decisions adopted by the Commission. This means that if the Commission issued decisions in line with the orientations in the Guidance, then the impact of the Guidance would be ultimately seen on the decisions of NCAs and NCs as they could not fundamentally contradict the decisions of the Commission.

The Notice on the co-operation between the Commission and NCs also reminded that when applying EU competition rules, NCs would be bound by the case law of the EU Courts as well as by Commission Regulations.<sup>89</sup> It stated that NCs might find guidance in Commission Regulations, Notices, Guidelines and Decisions which present elements of analogy with the case they are dealing with.<sup>90</sup> As NCs were obliged to follow both the Commission's soft law instruments and the established case law, it was argued that unless the EU Courts provided a clear and positive signal regarding the Guidance, a gap was expected to emerge between the Commission's proposed analysis and the established case law.<sup>91</sup> This highlighted another reason for the importance of the Guidance being endorsed by the EU Courts, otherwise NCs would be in a situation to make a choice between the Commission's more economics-based decisions and the EU Courts' formalistic judgments.

### **3.3.2. The Judgments of the EU Courts in the Post-Guidance Period**

Since the publication of the Guidance in late 2008, the EU Courts have handed down many judgments on Art.102 both as appeals to Commission Decisions (annulment actions) under Art.263 TFEU and preliminary rulings under Art.267 TFEU. The judgments in the post-Guidance period seem to be sending mixed signals. Appeals to Commission Decisions, most of which were adopted before the Guidance, show a high level of formalism in line

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<sup>88</sup> Whish (2011), p.161. The author contends that NCs, however, would most likely to feel that they should follow the case law, notwithstanding the statements of the Commission at variance with that law.

<sup>89</sup> Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54, para.8.

<sup>90</sup> *ibid.*

<sup>91</sup> Ezrachi (2009), p.59.

with the old case law. The only exception in this respect is seen in judgments on margin squeeze. The EU Courts seem to have adopted an effects-based approach to margin squeeze and upheld the use of the “as efficient competitor” test as the appropriate test for pricing abuses, but taken a different view from the Guidance which treats margin squeeze more alongside refusal to supply. Whereas, preliminary rulings in this period show a high level of compliance with the principles in the Guidance in terms of effects-based assessments, efficiency considerations and the “as efficient competitor” test.

*Clearstream*,<sup>92</sup> *Wanadoo*,<sup>93</sup> *Solvay*,<sup>94</sup> *Tomra*<sup>95</sup> and *Intel*<sup>96</sup> are among the formalistic judgments in this period. In *Clearstream*, the GCEU reminded that the dominant firm in question had a particular responsibility not to allow its conduct to impair genuine undistorted competition on the common market, and found that there was no need to prove actual effects as it was sufficient for the Commission to show that the conduct ‘tended to restrict competition’.<sup>97</sup> In *Wanadoo*, the CJEU upheld the decision of the GCEU which had taken a formalistic approach towards predatory pricing. The GCEU found abusive the pricing policy of the dominant firm in question and dismissed the arguments on economies of scale and learning effects as objective justification.<sup>98</sup> In *Solvay*, loyalty rebates of the dominant firm were found ‘contrary’ to Art.102.<sup>99</sup> The GCEU held the view that it was ‘apparent from a consistent line of decisions’ that a loyalty rebate was ‘contrary’ to Art.102.<sup>100</sup> It held that ‘the purpose’ of the rebates system was to ‘tie in customers’ and that it was ‘capable of having the effect of foreclosing competition’.<sup>101</sup>

Loyalty rebates were also the issue in *Tomra*. In this judgment, the GCEU rejected the argument that the Commission proved the form of conduct rather than its effects.<sup>102</sup> It

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<sup>92</sup> Case T-301/04 *Clearstream Banking AG v Commission* [2009] ECR II-3155.

<sup>93</sup> Case C-202/07 *France Télécom SA v Commission* [2009] ECR I-2369.

<sup>94</sup> Case T-57/01 *Solvay SA v Commission* [2009] ECR II-4621 overturned on procedural grounds in Case C-109/10 P *Solvay SA v Commission* [2011] ECR I-10329.

<sup>95</sup> Case T-155/06 *Tomra Systems ASA v Commission* [2010] ECR II-0297 upheld in Case C-549/10 P *Tomra Systems and Others v Commission* [2012] ECR I-0000.

<sup>96</sup> Case T-286/09 *Intel Corp v Commission* [2014] ECR II-0000.

<sup>97</sup> Case T-301/04 *Clearstream Banking AG v Commission* [2009] ECR II-3155, paras.144-145.

<sup>98</sup> Case T-340/03 *France Télécom SA v Commission*, ECR [2007] II-010, para.217.

<sup>99</sup> Case T-57/01 *Solvay SA v Commission* [2009] ECR II-4621.

<sup>100</sup> *ibid* at para.316.

<sup>101</sup> *ibid* at para.340.

<sup>102</sup> Case T-155/06 *Tomra Systems ASA v Commission* [2010] ECR II-0297, para.198.

held that it was sufficient to show that the conduct ‘tended to restrict competition’ or were ‘capable of having that effect’; the proof of ‘an actual impact on the relevant market’ was not necessary.<sup>103</sup> Dismissing the appeal in its entirety, the CJEU made it clear that prices below costs, which is taken into account in the context of conditional rebates in the Guidance, were ‘not a prerequisite of a finding that a retroactive rebates scheme operated by a dominant undertaking is abusive’.<sup>104</sup> In *Intel*, the GCEU heavily relied on *Tomra* to justify its arguments and took the view that loyalty rebates (referred to as “exclusivity rebates” in this judgment) ‘are by their very nature capable of foreclosing competitors’ when granted by a dominant undertaking.<sup>105</sup> The Court held that it was therefore ‘unnecessary to undertake an analysis of the actual effects of the rebates on competition’,<sup>106</sup> nor was it necessary to consider whether the decision was in line with the Guidance.<sup>107</sup> The GCEU also objected to the use of the “as efficient competitor” test in the context of loyalty rebates and in non-pricing abuses in general.<sup>108</sup>

Judgments and preliminary rulings on margin squeeze cases appear to be distinct from other types of abusive conduct and more in line with the economic theory. The EU Courts seem to have adopted an effects-based approach to margin squeeze and upheld the “as efficient competitor” test for assessing margin squeeze.<sup>109</sup> Interestingly, they even

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<sup>103</sup> *ibid* at paras.287-289.

<sup>104</sup> Case C-549/10 P *Tomra Systems and Others v Commission* [2012] ECR I-0000, para.73. The CJEU also rejected the argument that the contestable part of the relevant market was still sufficient to accommodate competitors. *ibid* at para.42. However, according to para.44 of the Guidance, the Commission will not consider that the rebate scheme in question is capable of foreclosing as efficient competitors, if competitors are capable of using the non-contestable portion of their buyers’ demand as leverage to decrease the price. The assessment of the contestable and non-contestable shares of demand in the Guidance has become inconsistent with the EU Courts’ case law after *Tomra*.

<sup>105</sup> Case T-286/09 *Intel Corp v Commission* [2014] ECR II-0000, para.87.

<sup>106</sup> *ibid* at para.103. The GCEU did not require the proof of ‘direct damage to consumers’ either. *ibid* at para.105.

<sup>107</sup> *ibid* at para.157.

<sup>108</sup> The Court stated that a price and cost analysis was not attributable to such rebates, and it was the grant of the condition of exclusivity or quasi-exclusivity itself which made it abusive. *ibid* at paras.150-153. According to the GCEU, even if the result of this test is positive, meaning that competitors are able to cover their costs *vis-à-vis* the conduct of the dominant undertaking, this does not mean that there is no foreclosure effect. This is because the ‘loyalty mechanism’ inherent in exclusivity rebates itself is capable of making access to the market more difficult for “as efficient competitors”, even if that access is not economically impossible. *ibid* at para.150-151.

<sup>109</sup> See Gohari, R. S. (2012) ‘Margin Squeeze in the Telecommunications Sector: A More Economics-based Approach’, *World Competition*, 35(2), p.216 and 231 (‘[T]he latest margin squeeze cases are clearly among the European courts’ *most progressive decisions on effects* in the context of Article 102 TFEU’... [they] ‘clearly constitute *important endorsements of the more economics-based approach*’.) (emphasis added) and

overturned the Commission's argument that the very existence of margin squeeze was sufficient regardless of its effects.<sup>110</sup> In *Deutsche Telekom*, the CJEU clarified that anti-competitive effects need to be shown for a margin squeeze to be ruled as an abuse; the very existence of the conduct is not sufficient.<sup>111</sup> The Court maintained that 'in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue cannot be classified as exclusionary'.<sup>112</sup> The CJEU made it thus clear that effects cannot be inferred; the proof of potential effects is required. In addition, the Court endorsed the use of the "as efficient competitor" test by deciding that the Commission was required to demonstrate effects on 'competitors who are at least as efficient as the dominant undertaking'.<sup>113</sup> These findings were also reiterated in later margin squeeze cases such as *TeliaSonera*<sup>114</sup> and *Telefónica*.<sup>115</sup>

On the other hand, the overall treatment of margin squeeze as an abuse in itself (stand-alone abuse) in all of those cases is clearly stricter than the Commission's lenient and less interventionist approach in the Guidance which instead treats it more alongside refusal to supply, as a form of constructive refusal to supply. Margin squeeze and refusal to supply are grouped under the same section in the Guidance (para.80) meaning that conditions which would make refusal to supply an abuse are therefore the same for margin squeeze. Notwithstanding, the GCEU held in *Telefónica* that the Commission was not required to demonstrate that Telefónica charged excessive prices for its wholesale products or predatory prices for its retail products.<sup>116</sup> Therefore, the treatment of margin squeeze in the Guidance sits at odds with its current treatment by the EU Courts in the post-Guidance

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Gormsen (2013), p.243 ('Following the judgments in *Deutsche Telekom*, *TeliaSonera* and *Post Danmark*, there is, in principle, judicial support for an effects-based approach in the form of an "as efficient competitor" test on exclusionary pricing practices...').

<sup>110</sup> See Case COMP/C-1/37.451, 37.578, 37.579 *Deutsche Telekom AG* [2003] OJ L263/9, para.180 ('By proving the existence of a margin squeeze, the Commission has therefore done enough to establish the existence of an abuse of a dominant market position.').

<sup>111</sup> Case C-280/08 *Deutsche Telekom AG v Commission* [2010] ECR I-9555, para.250.

<sup>112</sup> *ibid* at para.254.

<sup>113</sup> *ibid* at para.253.

<sup>114</sup> Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-0527, paras.60-67.

<sup>115</sup> Case T-336/07 *Telefónica and Telefónica de España v Commission* [2012] ECR I-0000, paras.268-271.

<sup>116</sup> *ibid* at para.187. The Court maintained that margin squeeze is the result of the spread between the prices for wholesale services and prices for retail services and not of the level of those prices as such. *ibid*. The assessment of the Court centres on whether the dominant firm would be able to make a profit, if it were to obtain the wholesale input at the same price it offers to its downstream competitors. This is a different analysis than the one set out for refusal to supply under para.81 of the Guidance.

period. This validates the opinion of AG Mazák who stated that Guidelines, in this respect the Guidance, ‘may form a useful point of reference’, but cannot bind the EU Courts.<sup>117</sup>

The CJEU issued an important preliminary ruling in the post-Guidance period which, according to some authors, has begun writing ‘a new chapter in the epic tale of unilateral conduct control’.<sup>118</sup> In *Post Danmark*, questions on predatory and selective pricing were referred to the CJEU. The Court first accepted that ‘not every exclusionary effect is necessarily detrimental to competition’.<sup>119</sup> Stressing the role of efficiency, the Court then stated that competition on the merits may lead to ‘the marginalisation of competitors that are *less efficient* and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation’.<sup>120</sup> It also upheld the use of the “as efficient competitor” test as the appropriate test for predatory pricing.<sup>121</sup> In addition, the Court listed the conditions of efficiency defence more into line with those in the Guidance, than those in its earlier *British Airways* judgment.<sup>122</sup> Lastly, the Court took into account long-run average incremental costs, which are the relevant cost benchmark under para.26 of the Guidance, in addition to average total costs, which have been the relevant cost benchmark in the established case law on predatory pricing.<sup>123</sup>

All in all, to date the post-Guidance period has shown that appeals to Commission Decisions show a high level of formalism in line with the old formalistic case law. This is hardly surprising since the relevant Commission Decisions were mostly adopted prior to the Guidance, and it would be unexpected if the EU Courts applied the principles in the Guidance to the case in question where the Commission had not applied them in the first place.<sup>124</sup> One notable feature of this period was that the law on margin squeeze has

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<sup>117</sup> Opinion of AG Mazák in Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-0527, fn.22.

<sup>118</sup> Rousseva, E. and Marquis, M. (2013) ‘Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU’, *Journal of European Competition Law and Practice*, 4(1), p.50.

<sup>119</sup> Case C-209/10 *Post Danmark A/S v Konkurrenserådet* [2012] ECR I-0000, para.22.

<sup>120</sup> *ibid* (emphasis added).

<sup>121</sup> *ibid* at para.38.

<sup>122</sup> *ibid* at para.42.

<sup>123</sup> *ibid* at para.37.

<sup>124</sup> Some authors have argued that although the EU Courts were technically correct to consider that the Guidance post-dated the relevant Commission Decisions, some ‘tentative favourable reaction’ towards the effects-based approach would clearly have been useful and appropriate. O’Donoghue and Padilla (2013), p.84. Whereas others have taken the view that the EU Courts could have mentioned the relevant methodology



developed more in line with modern economic thinking, but its treatment has differed from what the Guidance had envisaged for it. In addition, preliminary rulings in this period appear to ‘echo key aspects of the Guidance’,<sup>125</sup> though deriving sound conclusions from only two preliminary rulings can be disputed. The “as efficient competitor” test (only in the context of pricing abuses), efficiency considerations and some new cost benchmarks seem to have found support from the EU Courts, but the judgments are still not as much consumer-welfare oriented or effects-based as the Guidance. One can therefore argue that the Guidance seems to be endorsed in part by the EU Courts.

### **3.3.3. The Role of the Commission in the Post-Guidance Period**

After the Commission’s long endeavours during the modernisation of Art.102, one would expect the Commission to abide by the Guidance and comply with its enforcement priorities, thereby shaping its future decisions accordingly. The Commission was expected to make effects-based assessments, demonstrate theories of harm based on the concept of anti-competitive foreclosure, prove consumer harm and otherwise make more use of the Guidance. Up until the modernisation, the overwhelming majority of cases concerned Art.7 Regulation 1/2003 prohibition decisions as a result of which fines were imposed on dominant firms who were in breach of Art.102 together with a requirement to bring the infringement to an end by means of mostly behavioural remedies. However, this Section analyses the Commission’s practice in the post-Guidance by exploring its Art.9 Regulation 1/2003 commitment decisions, Art.7 Regulation 1/2003 prohibition decisions and rejection of complaint decisions/case closures.

#### **3.3.3.1. Art.9 Regulation 1/2003 Decisions**

The role of the Commission in enforcing Art.102 in the post-Guidance period appears to be quite different than what was expected. The most notable difference in practice is not substantive, but procedural. The difference is not the adoption of a more-economics based approach as expected, but the increasing use of commitments under Art.9 Regulation 1/2003. In recent years, the Commission has issued many Art.9 decisions whereby

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laid down in the Guidance if they had felt that the suggested approach therein was sensible. Gormsen (2013), p.238.

<sup>125</sup> O’Donoghue and Padilla (2013), p.85.

undertakings had entered into legally binding commitments with the Commission who then closed the investigation without having to prove any infringement and impose fines, in contrast to conventional Art.7 decisions which usually end with a finding of infringement and fines imposed on undertakings. Art.9 decisions are one of the most noted developments in the post-Guidance period which have arguably outstripped the practical discussions after the Guidance and altered the agenda for Art.102 in terms of substance and enforcement.<sup>126</sup> For this reason, the use of commitments marks another stage in the modernisation of Art.102, albeit informal.

Art.9 decision ‘is a formal settlement solicited by a company under investigation and agreed by the Commission where its enforcement priorities justify this choice.’<sup>127</sup> It involves accepting binding commitments for a certain period of time by the Commission, as well as their monitoring as a result of which undertaking will be subject to fines and/or periodic penalty payments if they fail to comply with their commitments.<sup>128</sup> As AG Kokott noted, the objective of Art.9 ‘is to ensure a quick and effective resolution of the competition problems while avoiding a considerable investigation and assessment effort on the part of the Commission’, as a result of which undertakings ‘are quickly given legal certainty and can avoid the finding of an infringement of competition rules’.<sup>129</sup> Table 1 shows the Art.7 and Art.9 decisions of the Commission on Art.102 in the post-Guidance period between 2008 and September 2014:

**Table 1** – Commission Decisions on Art.102 in the Post-Guidance Period<sup>130</sup>

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<sup>126</sup> Art.9 commitments have gained so much prominence in recent years that the Commission prepared a press release on frequently asked questions on the subject (see Press Release, “Antitrust: Commitment decisions – frequently asked questions”, MEMO/13/189, Brussels, 8 March 2013) and added a section on Art.9 commitments to “Antitrust procedures in abuse of dominance” in its website where it briefly explains the constituent elements of Art.102 and its enforcement (see <[http://ec.europa.eu/competition/antitrust/procedures\\_102\\_en.html](http://ec.europa.eu/competition/antitrust/procedures_102_en.html)> [accessed 30/09/2014]).

<sup>127</sup> Press Release, “Commitment decisions (Article 9 of Council Regulation 1/2003 providing for a modernised framework for antitrust scrutiny of company behaviour)”, MEMO/04/217, Brussels, 17 September 2004.

<sup>128</sup> See Art.23(2)(c) and Art.24(1)(c) Regulation 1/2003.

<sup>129</sup> Opinion of AG Kokott in Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949, paras.53-60.

<sup>130</sup> Source: <<http://ec.europa.eu/competition/antitrust/cases/index.html>> [accessed 30/09/2014]. It should be noted that the date of adoption of Commission decisions is taken into account instead of the date of official publication in the OJ.

	Art.7 Prohibition Decisions	Art.9 Commitment Decisions
<b>2008</b>	-	<i>German Electricity Balancing Market</i> <sup>131</sup> <i>German Electricity Wholesale Market</i> <sup>132</sup>
<b>2009</b>	<i>Intel</i> <sup>133</sup>	<i>RWE Gas Foreclosure</i> <sup>134</sup> <i>Gaz de France</i> <sup>135</sup> <i>Rambus</i> <sup>136</sup> <i>Microsoft (Tying)</i> <sup>137</sup>
<b>2010</b>	-	<i>Long-term Contracts France</i> <sup>138</sup> <i>Swedish Interconnectors</i> <sup>139</sup> <i>E.ON Gas</i> <sup>140</sup> <i>ENI</i> <sup>141</sup>
<b>2011</b>	<i>Telekomunikacja Polska</i> <sup>142</sup>	<i>Standard &amp; Poor's</i> <sup>143</sup> <i>IBM Maintenance Services</i> <sup>144</sup>
<b>2012</b>	-	<i>Rio Tinto Alcan</i> <sup>145</sup> <i>Reuters Instrument Codes</i> <sup>146</sup>
<b>2013</b>	-	<i>CEZ</i> <sup>147</sup> <i>Deutsche Bahn I</i> <sup>148</sup> <i>Deutsche Bahn II</i> <sup>149</sup>
<b>2014</b>	<i>Motorola</i> <sup>150</sup>	<i>Samsung</i> <sup>151</sup>

As can be seen from Table 1, the number of Art.9 decisions far outweighs the number of Art.7 decisions with 18 commitment decisions against only 3 prohibition decisions in the post-Guidance period.<sup>152</sup> The Commission issued at least one commitment

<sup>131</sup> Case COMP/39.389 *German Electricity Balancing Market* [2009] OJ C36/8.

<sup>132</sup> Case COMP/39.388 *German Electricity Wholesale Market* [2009] OJ C36/8.

<sup>133</sup> Case COMP/C-3/37.990 *Intel* [2009] OJ C227/07.

<sup>134</sup> Case COMP/39.402 *RWE Gas Foreclosure* [2009] OJ C133/10.

<sup>135</sup> Case COMP/39.316 *Gaz de France* [2010] OJ C57/13.

<sup>136</sup> Case COMP/38.636 *Rambus* [2010] OJ C30/17.

<sup>137</sup> Case COMP/39.530 *Microsoft (Tying)* [2010] OJ C36/7.

<sup>138</sup> Case COMP/39.386 *Long-term Contracts France* [2010] OJ C133/5.

<sup>139</sup> Case COMP/39.351 *Swedish Interconnectors* [2010] OJ C142/28.

<sup>140</sup> Case COMP/39.317 *E.ON Gas* [2010] OJ C278/9.

<sup>141</sup> Case COMP/39.315 *ENI* [2010] OJ C352/8.

<sup>142</sup> Case COMP/39.525 *Telekomunikacja Polska* [2011] OJ C324/7.

<sup>143</sup> Case COMP/39.592 *Standard & Poor's* [2012] OJ C31/8.

<sup>144</sup> Case COMP/39.692 *IBM Maintenance Services* [2012] OJ C18/6.

<sup>145</sup> Case AT.39230 *Rio Tinto Alcan* [2013] OJ C89/5.

<sup>146</sup> Case AT.39654 *Reuters Instrument Codes* [2013] OJ C326/4.

<sup>147</sup> Case AT.39727 *CEZ* [2013] OJ C251/4.

<sup>148</sup> Case COMP/AT.39678/*Deutsche Bahn I* [2014] OJ C86/4.

<sup>149</sup> Case COMP/AT.39731/*Deutsche Bahn II* [2014] OJ C86/4.

<sup>150</sup> Case AT.39985 *Motorola – Enforcement of GPRS SEPs* [2014] OJ C344/6.

<sup>151</sup> Case AT.39939 *Samsung – Enforcement of UMTS SEPs* [2014] OJ C350/8.

<sup>152</sup> It should be noted that the Commission issued another Art.7 decision on Art.102 in March 2014, namely Case AT.39984 *Romanian Power Exchange / OPCOM* [2014] OJ C314/7; however, the decision in question only dealt with discrimination on the basis of nationality. Therefore this decision is not added to Table 1 as it does not fall into the scope of the Guidance.

decision each year, but the same cannot be said for prohibition decisions. 18 commitment decisions in 7 years mean that the Commission has issued on average 3 commitment decisions per year after the publication of the Guidance, while it issued only 3 prohibition decision in 7 years. An average of 3 commitments per year is huge considering the fact that the Commission issued a total of 3 commitment decisions on Art.102 before the post-Guidance period.<sup>153</sup> In short, Table 1 indicates that Art.9 has become the predominant enforcement tool of the Commission in applying Art.102 in the post-Guidance period. The increasing use of commitments naturally begs the questions as to why the Commission has favoured Art.9 in the post-Guidance period and whether this dramatic change of policy is deliberate or merely coincidental.

Although it is hard to predict the state of mind of the Commission, the reason for the Commission's tendency to use Art.9 seems to be more than one. Within this context, Botteman and Patsa have identified five potential reasons: (i) the Commission's growing confidence in the parameters of the commitment procedure; (ii) the introduction of a more effects-based approach in Art.102 cases; (iii) a need to improve competitive conditions in certain regulated industries; (iv) the preference for quick remedies that are easily implemented in fast-evolving markets such as information technology (IT) markets and (v) the policy orientation of the Commissioner responsible for competition policy and their cabinet.<sup>154</sup> Given the fact that Art.9 decisions issued thus far deal with regulated industries and fast-evolving IT markets in line with (iii) and (iv),<sup>155</sup> it may well be that more than one reason has played a role in this respect. This Section does not purport to determine the real reason(s) behind the Commission's increasing use of Art.9 decisions. Instead it elaborates upon whether (ii) acted as a potential reason.

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<sup>153</sup> Case COMP/A.39.116/B2 *Coca-Cola* [2005] OJ L253/21; Case COMP/B-2/38.381 *De Beers* [2006] OJ L205/24; and Case COMP/B-1/37.966 *Distrigaz* [2008] OJ C9/8.

<sup>154</sup> Botteman, Y. and Patsa, A. (2013) 'Towards a More Sustainable Application of Commitment Decisions', *Journal of Antitrust Enforcement*, 1(2), p.351. Colomo puts forward another reason and points to dominant firms' incentive to reach negotiated solutions and avoid lengthy proceedings with little chances of success considering the ever-growing amount of fines imposed in Art.102 TFEU cases. Colomo, P. I. (2013) 'The Law on Abuses of Dominance and the System of Judicial Remedies', *Yearbook of European Law*, 32(1), p.405.

<sup>155</sup> It should be noted that 9 out of those 18 commitment decisions concern the energy sector, while 4 of them concern IT markets. Indeed, the Commission's propensity to divert competition enforcement procedures in order to meet the regulatory targets it failed to achieve through the legislative procedure has been highlighted as a potential reason for the commitments in energy sector. Moullet, P. (2013), 'How Should Undertakings Approach Commitment Proposal in Antitrust Proceedings', *European Competition Law Review*, 35(2), p.87.

On the one hand, the increasing use of commitments in the post-Guidance may signal the fact that Art.9 commitments complement the modernisation of Art.102. One could argue that the effects-based approach with a greater recognition of efficiency gains and an emphasis on the impact of conduct on consumer welfare as adopted by the Guidance necessitates a case-by-case analysis and Art.9 facilitates such an analysis.<sup>156</sup> Commitment decisions involve the consideration of specific facts of the case in question and allow the Commission and the undertakings concerned to mutually design a remedy which can be best tailored to address the competition concern(s) in question. As will be discussed below, since commitment decisions are *de facto* insulated from judicial review, the Commission may steer the enforcement of Art.102 through its own line of reasoning in a way that is compatible with the modernisation.

On the other hand, Art.9 commitments may be a ‘convenient way to circumvent the economic complexity and resource-intensive fact-gathering inherent to infringement actions’ on the part of the Commission.<sup>157</sup> As discussed in Chapter 2, the effects-based approach requires that the Commission will be under a heavy burden of proof to develop theories of harm and support them with economic evidence. However, in the context of commitment decisions, the Commission does not have to do this. Because the Commission would have to spend more resources in Art.102 cases, it may have deliberately relied on Art.9 decisions which helped it to loosen its burden to prove the alleged abuse to the required degree under the Guidance. Should the Commission in its commitment decisions renege on its rigorous analysis of the dominant position and/or of abuse as it set forth in the Guidance, the increasing use of Art.9 may well represent a change backwards in the modernisation of Art.102.

Indeed, a careful analysis of commitment decisions shows that they often contain inadequate information as to how the dominant position has been determined and how the abuse of that position has been demonstrated. They refer to “preliminary assessments” of the Commission and include expressions such as ‘*the Commission provisionally concluded*

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<sup>156</sup> It has been argued that moving competition policy away from a rule-based approach and towards a case-by-case approach enhances the scope for commitment decisions. Budzinski, O. and Kuchinke, B. A. (2012) ‘Deal or No Deal?, Consensual Arrangements as an Instrument of European Competition Policy’, *Review of Economics*, 63(3), p.265-292.

<sup>157</sup> Botteman and Patsa (2013), p.352.

that', 'the Commission came to the preliminary conclusion that', 'the Commission took the preliminary view that', and 'the Commission's preliminary view is that' and so on. In commitment decisions, the Commission often concludes 'without having reached a definitive view'. Undertakings 'appear to be dominant',<sup>158</sup> or are 'considered to hold a dominant position',<sup>159</sup> and 'may have abused' <sup>160</sup> their dominant positions or, alternatively, 'the Commission has concerns as to compatibility with [Art.102] of practices'.<sup>161</sup> Some decisions point to 'potentially abusive behaviour',<sup>162</sup> as the subject of commitments. The preliminary assessments in commitments constitute only a *prima facie* opinion of the Commission,<sup>163</sup> rather than the proof of a robust theory of harm to the required degree.

It can be observed from the commitment decisions that the Guidance played either a marginal role or no role at all. The Commission showed a tendency to rely on the case law, instead of the Guidance. In *ENI*, while listing the conditions for refusal to supply to amount to an abuse, the Commission referred to the *Bronner* judgment of the CJEU,<sup>164</sup> rather than the Guidance.<sup>165</sup> Similarly, in *Microsoft (Tying)*, the Commission cited the *Microsoft* judgment of the GCEU,<sup>166</sup> rather than the Guidance while listing the conditions for tying to amount to an abuse.<sup>167</sup> By contrast, in *Rio Tinto Alcan*, the Commission listed the conditions for tying in line with the Guidance, but without citing the Guidance.<sup>168</sup> Instead, the established case law on tying was stressed. Also, the Commission used the Guidance's terminology of "anti-competitive foreclosure" and the conditions of efficiency defence in the Guidance, but again made no reference to the Guidance even in footnotes.<sup>169</sup>

The same is true for the proof of consumer harm as well. As discussed above, the Guidance has been criticised for failing to pay adequate attention to the proof of consumer

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<sup>158</sup> See *IBM Maintenance Services* and *Reuters Instrument Codes*.

<sup>159</sup> See *ENI*.

<sup>160</sup> See *E-ON Gas* and *CEZ*.

<sup>161</sup> See *Rio Tinto Alcan*.

<sup>162</sup> See *RWE Gas Foreclosure*.

<sup>163</sup> Richter, M. (2012) 'The Settlement Procedure in the Context of the Enforcement Tools of European - A Comparison and Impact Analysis', *European Competition Law Review*, 33(11), p.540.

<sup>164</sup> Case C-7/97 *Oscar Bronner v Mediaprint* [1998] ECR I-7791.

<sup>165</sup> *ENI*, para.40.

<sup>166</sup> Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601.

<sup>167</sup> *Microsoft (Tying)*, para.33.

<sup>168</sup> *Rio Tinto Alcan*, para.59.

<sup>169</sup> *ibid* at paras.67 and 87.

harm.<sup>170</sup> It can be seen that commitment decisions do not pay particular attention to it either. In *E-ON Gas*, the Commission came to the preliminary conclusion that E-ON's "long-term capacity bookings" constitute a bottleneck at the entry point into E-ON's network, 'possibly leading to considerable consumer harm.'<sup>171</sup> In *Rio Tinto Alcan*, the Commission's preliminary assessment was that 'the scope of foreclosure is substantial and may be sufficient for creating consumer harm.'<sup>172</sup> In *Reuters Instrument Codes*, Thomson Reuters' conduct was preliminary found 'liable to cause consumer harm and foreclose competition' in the relevant market.<sup>173</sup> So the commitments issued thus far appear to have lagged behind the Guidance in terms of the proof of consumer harm. It is also noteworthy that especially the cases in IT markets were initiated upon complaint by competitors, which may mean that the "protection of competition, not competitors" principle of the Guidance might not have been adequately respected by the Commission.<sup>174</sup>

Types of abuses and theories of harm, too, deserve mention. Especially the commitment decisions in the energy sector involve complex economic and legal issues, as well as seemingly new forms of exclusionary and exploitative conduct. These involve "long-term capacity bookings",<sup>175</sup> "capacity withdrawal",<sup>176</sup> "capacity hoarding",<sup>177</sup> and "strategic underinvestment".<sup>178</sup> Since these decisions mainly concerned with energy incumbents, allegations often centred on refusal to access to networks. Other cases also involve new forms of abuses such "abuse of standard-essential patents" including "patent ambush"<sup>179</sup> and "seeking injunction relief contrary to FRAND commitments".<sup>180</sup> Other than refusal to supply, exclusive dealing<sup>181</sup> and margin squeeze,<sup>182</sup> tying is the only "most

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<sup>170</sup> See *supra* "3.2.1. Anti-competitive Foreclosure".

<sup>171</sup> *E-ON Gas*, para.63.

<sup>172</sup> *Rio Tinto Alcan*, para.77.

<sup>173</sup> *Reuters Instrument Codes*, para.43.

<sup>174</sup> *Rambus*, *Microsoft (Tying)*, *IBM Maintenance Services* and *Samsung* were all initiated upon complaint. On the other hand, the Commission has been very pro-active in the energy sector since, except *Swedish Interconnectors*, all of the investigations in this sector were opened ex officio. As for the remaining decisions; *Rio Tinto Alcan* and *Standard and Poor's* were initiated upon complaint, while *Reuters Instrument Codes* was opened ex officio.

<sup>175</sup> *Gaz de France* and *E-On Gas*.

<sup>176</sup> *German Electricity Wholesale Market*.

<sup>177</sup> *ENI* and *CEZ*.

<sup>178</sup> *ENI*.

<sup>179</sup> *Rambus*.

<sup>180</sup> *Samsung*.

<sup>181</sup> *Long-term Contracts France*.

common” type of abusive conduct.<sup>183</sup> No commitment decision exists thus far on predatory pricing or rebates. Therefore, in the post-Guidance period, the Commission has mainly dealt with seemingly new forms of potentially abusive conduct on which there is hardly any guidance in the Guidance.

Many of these seemingly novel forms of potentially abusive conduct have raised novel competition concerns and it is not clear whether they actually amount to an abuse under Art.102.<sup>184</sup> As commitment decisions are tend to be shorter than infringement decisions in terms of their length and do not extensively discuss findings and theories of harm, it is doubtful whether they are of much practical significance for future stakeholders other than the undertakings directly affected by them. Though Art.9 decisions do not require undertakings to waive their rights of appeal, they are less inclined to challenge their own voluntary commitments, and therefore these decisions are *de facto* insulated from judicial review.<sup>185</sup> The tendency to resolve cases via commitment decisions leaves the EU Courts with reduced scope to control the way the Commission handles its cases.<sup>186</sup> The main supervision of commitments is done by monitoring trustees appointed by the Commission, but they do not have the right to dispute whether the commitments are appropriate; they only observe whether commitments have been complied with. Taking

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<sup>182</sup> *Deutsche Bahn I-II*.

<sup>183</sup> *Microsoft (Tying), Rio Tinto Alcan.*

<sup>184</sup> To illustrate this, long-term capacity bookings in fact differ from long-term supply contracts, since long-term supply contracts are signed with customers and are liable to foreclose the market to competitors, whereas long-term capacity bookings do not involve customers and are agreed upon between incumbents and their downstream subsidiaries. Normally agreements between subsidiaries and their parent companies do not fall into the scope of Art.101 TFEU, but apparently they were treated differently under Art.102 in the commitment decisions. Furthermore, Dunne finds “strategic underinvestment” particularly striking in that it goes considerably beyond the parameters of the already controversial refusal to supply doctrine as the dominant firm is being blamed for refusing to supply transport capacity that it does not actually possess. Dunne, N. (2014) ‘Commitment Decisions in EU Competition Law’, *Journal of Competition Law and Economics*, 10(2), p.421. Whether these and other novel issues will be adequately discussed is doubtful given the nature of commitments.

<sup>185</sup> The landmark judgment concerning the judicial review of Art.9 decisions to date is *Alrosa* where the CJEU granted the Commission a broad margin of assessment and did not require it to conduct extensive factual and economic analysis of all possible alternative commitments and to choose the least onerous commitment among them, but only the one that addresses its concern(s). Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949. See also Wils, W. (2006) ‘Settlement of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003’, *World Competition*, 29(3), p.363 (‘There would however not appear to be many grounds on which one could imagine [an application for annulment of the commitment decision] to be brought in practice and to have a chance of success.’).

<sup>186</sup> Rousseva and Marquis (2013), p.32.



those into account, the procedural change in the enforcement will have a bearing on both the substantial evolution of decisions on Art.102 and the modernisation.

Too much reliance on commitment decisions poses a crucial risk that the existing formalistic case law will continue to govern the law on Art.102 leaving little room for EU competition law to be brought into line with modern economic thinking on unilateral conduct as envisaged by the modernisation. Concerning the fact that most of the novel issues and theories of harm in commitment decisions thus far are not properly given guidance under the Guidance, this risk is exacerbated. In the wake of transition to the effects-based approach, judicial review of Commission Decisions is more important than ever.<sup>187</sup> The question remains as to whether the modernisation of Art.102 was worth the effort if the Commission was to make increasing use of Art.9 commitments, as they involve only preliminary assessments and not so robust theories of harm which are tried to be supported with insufficient economic evidence, rather than well-founded effects-based assessments with an emphasis on consumer harm.<sup>188</sup> Surely, the Commission could have made such use in the first place without having had to engage in years reviewing Art.102.

Consequently, the post-Guidance period has been shaped in a completely different legal and institutional landscape than what was expected and Art.9 has stood out as a predominant enforcement tool for the Commission in this period. Against this background, one can reasonably argue that the use of commitments marks another stage in the modernisation of Art.102, albeit informal, as commitment decisions have outstripped many practical discussions that were expected to take place after the issue of the Guidance but instead given rise to new problems on the appropriateness, legal review, monitoring and excessive use of commitment decisions on Art.102.<sup>189</sup> If the Commission reneges on the Guidance in Art.9 commitments and continues to satisfy with “preliminary assessments”

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<sup>187</sup> See Cengiz, F. (2011) ‘Judicial Review and the Rule of Law in the EU Competition Law Regime after *Alrosa*’, *European Competition Journal*, 7(1), p.137 (‘[C]larification of the interpretation of EU competition rules by the judicature has become more essential nowadays than ever, due to the more economics-based approach advocated by the Commission and the legal uncertainty caused by this process...’).

<sup>188</sup> It has been argued that consumer welfare will not benefit from expanding the role and importance of commitments; therefore, any extension of commitments in European competition policy should be met with scepticism and caution. Budzinski and Kuchinke (2012), p.265-292.

<sup>189</sup> Commentators have even begun to speak of a need for a Notice dedicated exclusively to commitments decisions in EU competition law for the sake of good administration and legal certainty. See Botteman and Patsa (2013), p.367.

instead of making rigorous effects-based assessments, the contributions of the Guidance to the modernisation of Art.102 would not be adequately reflected to Commission Decisions, which should have instead been the lifeblood of the new reading of Art.102 *vis-à-vis* the EU Courts' formalistic judgments in the first place. At the end, this informal stage would be unlikely to be a positive stage in contrast to the previous successful stages and may result in a change backwards in the modernisation of Art.102. Limiting the use of commitments might yield positive results, but further research is needed in this respect.<sup>190</sup>

### 3.3.3.2. Art.7 Regulation 1/2003 Decisions

As for the Art.7 decisions in the post-Guidance period, the first decision that was issued after the publication of the Guidance is *Intel*. Because the Commission initiated legal proceedings against Intel before the Guidance was published, it is noted in the decision that the Guidance was not technically applied.<sup>191</sup> The Commission claimed that its decision was nevertheless in line with the Guidance.<sup>192</sup> In *Intel*, the Commission reached the conclusion that Intel's rebates constituted "loyalty rebates" and therefore they were 'in themselves sufficient to find an infringement under Article [102] according to the case law' in the absence of any objective justification.<sup>193</sup> However, the Commission went on to analyse the anti-competitive effects of those rebates in the market. In doing so, the Commission made references to the Guidance's concept of anti-competitive foreclosure and demonstrated whether Intel's rebates were 'capable of causing or likely to cause anticompetitive foreclosure (which is likely to result in consumer harm)'.<sup>194</sup>

To this end, '*one possible way*' according to the Commission was to 'conduct an as efficient competitor analysis'.<sup>195</sup> The Commission applied the "as efficient competitor" test,

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<sup>190</sup> It has been argued that commitment decisions should be seen as a marginal tool available to antitrust authorities to be used to solve specific (and less serious) infringements. Pera, A. and Carpagnano, M. (2008) 'The Law and Practice of Commitment Decisions: A Comparative Analysis', *European Competition Law Review*, 29(12), p.671. Botteman and Patsa claim that in cases involving novel issues or untested theories of harm that effective restraints to the use of commitments are needed. Botteman and Patsa (2013), p.369.

<sup>191</sup> *Intel*, para.916

<sup>192</sup> See Press Release, "Antitrust: Commission imposes fine of 1.06 billion euros on Intel for abuse of dominant position; orders Intel to cease illegal practices - questions and answers", MEMO/09/235, Brussels 13 May 2009.

<sup>193</sup> *Intel*, para.925.

<sup>194</sup> *ibid.*

<sup>195</sup> *ibid* (emphasis added).

but also noted that this was ‘*not indispensable* for finding an infringement under Art[102] according to the case law’.<sup>196</sup> Nor did the Commission find indispensable the demonstration of actual effects for a finding of infringement as this was not required in the case law or in the Guidance.<sup>197</sup> It is noteworthy that the Commission’s assessment of rebates mirrored the section on “conditional rebates” in the Guidance (paras.37-46). However, when listing the conditions of the efficiency defence, the decision cited the *British Airways* judgment of the CJEU rather than para.30 of the Guidance on efficiencies.<sup>198</sup> On appeal, the GCEU took a negative stance against the use of the “as efficient competitor” test in the context of loyalty rebates, which was used by the Commission only ‘*for the sake of completeness*’,<sup>199</sup> and adopted a form-based approach by taking the view that loyalty rebates ‘are by their very nature capable of restricting competition’ and of ‘foreclosing competitors’.<sup>200</sup>

In the second Art.7 decision, in *Telekomunikacja Polska*, the Commission decided that Telekomunikacja Polska committed an abuse by way of a refusal to deal and a series of related practices such as proposing unreasonable conditions, delaying the negotiation processes, rejecting orders in an unjustifiable manner and refusing to provide reliable and accurate information to alternative operators. In this decision, the Commission seems to have adopted an effects-based approach and demonstrated detrimental effects of the alleged abuse on consumers, while noting at the same that the proof of consumer harm was ‘not necessary in order to prove an abuse’ under the case law.<sup>201</sup> Telekomunikacja Polska claimed that there was no Union interest and the Commission had no grounds for action, but the Commission rejected this claim by pointing to the Guidance that its refusal to supply would be considered as an enforcement priority.<sup>202</sup> However, when establishing the abuse, the Commission did not refer to the concept of anti-competitive foreclosure. On the other hand, the Commission referred to the Guidance when assessing the objective necessity defence.<sup>203</sup>

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<sup>196</sup> *ibid* (emphasis added).

<sup>197</sup> *ibid* at para.919.

<sup>198</sup> *ibid* at para.1624.

<sup>199</sup> Case T-286/09 *Intel Corp v Commission* [2014] ECR II-0000, para.159 (emphasis added).

<sup>200</sup> *ibid* at para.85-87.

<sup>201</sup> *Telekomunikacja Polska*, para.816.

<sup>202</sup> *ibid* at para.131.

<sup>203</sup> *ibid* at para.874.

In the last Art.7 decision, in *Motorola*, the Commission explicitly stated that ‘the present Decision meets the Commission’s enforcement priorities’.<sup>204</sup> Despite this claim, a careful analysis of the decision shows that there is hardly any reference to the Guidance. In some of its paragraphs, the decision referred to effects of the conduct in question, seeking injunction relief for standard essential patents, but it appears that the analysis of effects remained weak as the Commission noted quite contrary to the fundamentals of the effects-based approach that Art.102 ‘prohibits behaviour that tends to restrict competition or is capable of having that effect, regardless of its success’.<sup>205</sup> The Commission also cited some old formalistic judgments of the EU Courts and emphasised the special responsibility of dominant firms.<sup>206</sup> Furthermore, when establishing the abuse, the Commission was silent on the concept of anti-competitive foreclosure. In addition, when listing the conditions of the efficiency defence, the decision cited the *Post Danmark* judgment rather than para.30 of the Guidance.<sup>207</sup>

All in all, a limited number of Art.7 decisions were issued by the *Commission vis-à-vis* a vast number of Art.9 decisions in the post-Guidance period. *Intel* is the best example of the successful application of the Guidance in this period, though the Commission’s decision was upheld not because the GCEU endorsed the Commission’s assessment of loyalty rebates in the Guidance, but because the established jurisprudence have long condemned loyalty rebates since *Hoffmann La Roche*. The Commission seems to have adopted a “just in case” approach in those Art.7 decisions in that it tried to prove anti-competitive effects and consumer harm so as to comply with the Guidance, but also noted at the same time that what it was doing was in fact not required by the case law. It is hard to argue that the Guidance fully influenced the outcome reached in those decisions, as the Commission did not consistently apply the contributions of the Guidance in every case: The concept of anti-competitive foreclosure was mentioned in *Intel* but not in *Telekomunikacja Polska* or *Motorola*, and the conditions of the efficiency defence (or objective necessity) were based on the Guidance in *Telekomunikacja Polska* but not in *Intel* or *Motorola*.

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<sup>204</sup> *Motorola*, para.1, fn.4.

<sup>205</sup> *ibid* at para.308 (citations omitted).

<sup>206</sup> See paras.272, 279 and 468.

<sup>207</sup> *ibid* at para.421.

### 3.3.3.3. Rejection of Complaints and Case Closures

The final practice of the Commission in the post-Guidance period comprises the decisions on rejection of complaints and on case closures. It has been long acknowledged by the EU Courts that the Commission is not required to conduct an investigation of each complaint it receives and has therefore discretion in the treatment of complaints made to it.<sup>208</sup> The Commission is not obliged to adopt a decision once it receives a complaint, therefore not all investigations result in Art.7 or Art.9 decisions when there is no sufficient degree of Union interest. In addition, Commission decisions on rejection of complaints are essential in order to thoroughly analyse the impact of the Guidance in the post-Guidance period. The (non-)enforcement of the Guidance could be observed in the complaints that the Commission has rejected to pursue since the reason(s) to reject such complaints could be because of the Commission's new reading of Art.102 following the Guidance.

Shortly after the publication of the Guidance, the Commission rejected the complaint made by the European Federation of Ink and Ink Cartridge Manufacturers (EFIM) against various manufacturers of inkjet printers and cartridges *inter alia* for an alleged violation of Art.102 by attempting to exclude other manufacturers from the aftermarkets for supply of cartridges and/or toners through patenting strategies and similar tactics.<sup>209</sup> Based on some of its former rejection decisions on the same issue, the Commission closed the complaint due to the insufficient likelihood of establishing the proof of an infringement of Art.102 as there was no *prima facie* evidence that none of the undertakings had a dominant position in the primary market for ink jet printers. The Guidance was not relied on in this case, but the Commission stated that it aims to 'focus on conduct which is likely to harm competition, and consequently consumers', but this did not appear to be the case in the case at issue.<sup>210</sup>

The Commission also rejected the complaint made by Ryanair against the Dublin Airport Authority (DAA) and Aer Lingus *inter alia* for an alleged violation of Art.102 through excessive pricing, discrimination, bundling and a manifest failure to satisfy

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<sup>208</sup> See in particular Case T-24/90 *Automec Srl v Commission* [1992] ECR II-2223, para.76.

<sup>209</sup> Case COMP/C-3/39.391 *EFIM* [2009] (rejection of complaint).

<sup>210</sup> *ibid* at para.31. The appeal against the Commission's rejection decision was dismissed in Case T-296/09 *EFIM v Commission* [2011] ECR II-0425.

demand.<sup>211</sup> In the decision, the Commission left open the definition of the market and determination of the dominant position, and focused more on the abuse element. The investments into Dublin airport provided the background to the alleged infringements. Firstly, the Commission decided that there was no indication of excessive pricing on the part of the DAA. The Commission maintained that there was no discrimination either because there was no application of dissimilar conditions to equivalent parties and DAA also lacked the incentive to discriminate. In addition, there were no separate products, as required for bundling, as well as no foreclosure in this particular case as DAA was not in competition with the airlines. With regard to the last allegation, there was no manifest failure to satisfy demand since Ryanair's complaint only involved a service which was not provided at a price that it considered appropriate.

The Commission came to the conclusion that there were insufficient grounds for conducting a further investigation into the alleged infringements and it would be disproportionate to further investigate Ryanair's claims. The Guidance was also not relied on in this case. In fact, three out of four allegations of Ryanair comprised types of abusive conduct which were left outside the scope of the Guidance. Only bundling as an exclusionary practice could have been examined under the Guidance, but the case involved a situation where the alleged bundling had taken place in the downstream market where the alleged dominant firm was not present. Although the Guidance is silent on its application when bundling takes place in a downstream market, it makes it clear in the context of refusal to supply that it only deals with the situation where the dominant firm competes on the downstream market together with its downstream competitors with whom it refuses to supply (para.76). Therefore, the alleged bundling would have been hardly examined under the Guidance, had the Guidance been applied in this decision.

In *SU/CEZ*, the Commission rejected the complaint of SU against the Czech electricity incumbent, CEZ, concerning the allegations of discriminatory pricing, predatory pricing and imposition of unfair trading conditions.<sup>212</sup> The case hardly concerned the (non-)enforcement of the Guidance and the Commission decided to take no further action as the complainant repeated before the Commission the same allegations which had already been

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<sup>211</sup> Case COMP/39.886 *Ryanair/DAA-Aer Lingus* [2013] (rejection of complaint).

<sup>212</sup> Case AT.39958 *SU/CEZ* [2014] (rejection of complaint).

dealt with and eventually rejected by the Czech Competition Authority.<sup>213</sup> Furthermore, the Commission rejected the complaint against Greece and the Greek Organisation of Football Prognostics (OPAP) concerning an infringement of Art.102 in conjunction with Art.106 TFEU through the grant and exercise of an exclusive licence concerning the operation of video lottery terminals.<sup>214</sup> The case hardly concerned the (non-)enforcement of the Guidance either and the appeal before the GCEU on the grounds of breach of duty to investigate with due care and diligence and of duty to state reasons on the part of the Commission was rejected.<sup>215</sup>

As for the case closures, the most important case is *Velux* where the Commission closed the investigation it launched ex officio into Velux's *inter alia* allegedly abusive rebates, bonuses and reimbursements.<sup>216</sup> The Commission found that Velux enjoyed wide brand recognition and had a very strong position in the relevant market for sales of roof windows and accessories in different MSs. The Commission observed that Velux's rebate scheme was incremental (each unit exceeding the threshold earned the rebate), standardised (described in the general conditions and offered to all customers irrespective of their specific circumstances) and the increments were small (starting from 0.5% to a top rate of 5%). Under the Guidance, incremental rebates are less likely to lead to anti-competitive foreclosure than retroactive rebates (paras.37 and 40), just as standardised rebates are less likely to lead to such foreclosure than individualised rebates (para.45). Because the customers could get a maximum rate of only 5%, the estimated effective price for competitors was close to the average price of Velux, suggesting that competitors would likely to match Velux's rebates.

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<sup>213</sup> Similarly in another rejection decision, the Commission decided that since the alleged excessive pricing and discrimination on the part of the Amsterdam Airport had already been dealt with by the Dutch Competition Authority, it rejected the complaint of easyJet. Case COMP/39.869 *easyJet/Schiphol* [2013] (rejection of complaint). See also Case COMP/39.707 *Si.mobil/Mobitel* [2011] (rejection of complaint) where the Commission *inter alia* rejected the complaint on the grounds that a NCA was already dealing with the same allegations at the national level. Neither of these decisions concerned the (non-)enforcement of the Guidance and were primarily related to procedural issues under Art.13 Regulation 1/2003 in re-lodging a complaint with the Commission when a NCA has already dealt with or is dealing with the very same allegation(s).

<sup>214</sup> Case COMP/39.981 *Stanleybet Group 2/OPAP* [2013] (rejection of complaint).

<sup>215</sup> Case T-416/13 *Stanleybet Malta and Stanley International Betting v Commission* [2014] ECR II-0000.

<sup>216</sup> Case COMP/39.451 *Velux* [2009] (rejection of complaint). It should be noted that no formal decision is issued with regard to this case and nothing is available to public in the Commission's website either. The reporting of the case in question is based on the following article: Albaek, S. and Claici, A. (2009) 'The Velux Case – An in-depth Look at Rebates and More', *Competition Policy Newsletter*, No 2, p.44-47.

Having analysed the rebates of Velux in the light of the Guidance, the Commission found that the price that the competitors would have to offer to compensate the loss of rebate when the customer would switch its demand from Velux was above the long-run average incremental costs of Velux. According to para.43 of the Guidance, in such situations the rebate scheme in question would not normally be capable of foreclosing the market in an anti-competitive way. So the Commission decided that the rebates granted by Velux allowed “as efficient competitors” to compete profitably. The Commission concluded that such a rebate scheme would be unlikely to generate exclusionary effects and to give rise to anti-competitive foreclosure, thus having an adverse impact on consumer welfare. The case was welcomed in the literature and according to some commentators, the case ‘puts flesh on the bones of the [Guidance]’<sup>217</sup> and ‘shows how the approach advocated in the [Guidance] can be applied in practice’.<sup>218</sup> There are five other less important case closures regarding the application of Art.102; however, in none of those cases did the Commission provide any information on how the (non-)enforcement of the Guidance had an impact on the closure of those cases.<sup>219</sup>

Consequently, what was expected from the rejection decisions and case closures of the Commission in the post-Guidance period was to clearly see the Commission’s exercise of its enforcement priorities it had set out in the Guidance in the cases which it decided not to pursue. However, the analysis of the Commission’s rejection decisions and case closures in this period leads to disappointment. Among several rejection decisions, the trails of the Guidance are visible only in one decision, *Velux*. Even in *Velux*, there is no formal public information and how the Guidance had an impact on the outcome can be understood only from secondary sources. Rather than the substantive assessments of the Guidance, mostly procedural issues have influenced the rejection of the complaints made to the Commission.

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<sup>217</sup> Batchelor, B. and Jebelli, K. Y. (2011) ‘Rebates in a State of Velux: Filling in the Gaps in the Article 102 TFEU Enforcement Guidelines’, *European Competition Law Review*, 32(11), p.545.

<sup>218</sup> Albaek and Claici (2009), p.47.

<sup>219</sup> Case COMP/39387 *Long-term Contracts in Belgium* [2011] (case closure) (long-term exclusive purchase obligation in supply contracts); Case COMP/B2/39.246 *Boehringer* [2011] (case closure) (misuse of patent system in order to exclude potential competition); Press Release, “Antitrust: Commission closes investigation in pharmaceutical companies AstraZeneca and Nycomed”, IP-12-210, Brussels 1 March 2012 and Case COMP/38.574 *Synthon/GlaxoSmithKline* [2012] (case closure) (both cases focused on joint or unilateral conduct potentially delaying the market entry of generic pharmaceuticals); Case AT.39915 *Deutsche Bahn III* [2013] (case closure) (margin squeeze, rebates); and Case AT.39840 *MathWorks* [2014] (case closure) (refusal to provide end-user licences and interoperability information).



Decisions on case closures in this period lead to even more disappointment. In none of those cases did the Commission provide adequate information on why the case in question was closed other than posting a brief note that it closed the case. There is no information on how the (non-)enforcement of the Guidance had an impact on the closure of those cases.

## **Conclusion**

Chapter 3 was devoted to the analysis of the Guidance as the main outcome of the modernisation and the culmination of the Commission's efforts to modernise the manner it enforces Art.102. Within a broad framework, it analysed the purpose behind adopting the Guidance, the legal regime of the Guidance and the criticisms of commentators' that have been levelled against the Guidance in Section 3.1, the specific contributions of the Guidance to the enforcement of Art.102 in Section 3.2 and finally the legal and institutional landscape which has shaped the post-Guidance period in Section 3.3. Section 3.1 observed that the Guidance was carefully worded as "Guidance" instead of "Guidelines" and although it is said to contain only "enforcement priorities" of the Commission, many of its paragraphs offer interpretations that differ significantly from the EU Courts' case law on various points which leads one to the conclusion that the Commission has aimed to shape the future direction of the law on Art.102. Section 3.2 observed that all of the four contributions of the Guidance are actually designed to promote an effects-based and consumer welfare-oriented enforcement of Art.102 which aims to achieve a substantive assessment of abusive conduct based on the effects it generates on consumers with the help of economic and econometric analysis. Finally, Section 3.3 observed that Art.9 Regulation 1/2003 commitments mark another, albeit informal, stage in the modernisation of Art.102, as the Commission's increasing use of such commitments has outstripped many practical discussions that were expected to take place after the issue of the Guidance but instead created new problems on the appropriateness, legal review and excessive use of commitments in Art.102 cases.

## **PART II**

### **CHAPTER 4 – ADOPTING GUIDELINES IN RELATION TO ART.6: THEORY AND PRACTICE**

#### **Introduction**

Chapter 4 provides answers to the first main research question as to whether there is a need for Guidelines in relation to Art.6 in Turkey and whether the Guidance can or should be used as a model for such Guidelines. To this end, it addresses three sub-questions: First, what are the likely benefits and costs of adopting Guidelines in relation to Art.6? Second, what is the impact of Turkey's duty to harmonise with the EU *acquis* on the adoption of the Guidance as Guidelines in relation to Art.6 in Turkish competition law? Lastly, what are the opinions of the internal staff of the TCA, lawyers, judges and academics in Turkey on the adoption of Guidelines in relation to Art.6? This Chapter takes both a theoretical and a practical approach in seeking answers to the relevant research question, and is enhanced by the qualitative empirical data obtained from the research interviews.

Chapter 4 is divided into three sections: Section 4.1 is concerned with the general role of Guidelines as soft law instruments in the enforcement of EU competition law and draws conclusions for Turkey. This Section examines the functions of Guidelines in theory and analyses the benefits they offer, as well as the drawbacks they entail, to enforcers of competition law rules and to undertakings as the addressees of those rules. In the light of the functions of Guidelines, the Section makes some remarks on the adoption of Guidelines in relation to Art.6 in the example of Turkey. Section 4.1 observes that the TCA and other State authorities in Turkey have explicitly stressed the need for adopting Guidelines in relation to Art.6, which would theoretically provide transparency and predictability, increase legal certainty and minimise inconsistencies in the decisions of the TCA, while resulting in a voluntary restraint on the discretion of the TCA.

Section 4.2 sheds light on the impact of Turkey's potential accession to the EU in an attempt to determine whether the Guidance should be used as a model when adopting Guidelines in relation to Art.6. This Section takes the view that the approximation of

Turkish competition law with the entire body of EU competition law as required by the accession regime may have a bearing on the transposition of the Guidance into Turkish competition law. First, the Section outlines the accession process of Turkey to the EU with a focus on competition policy as a negotiation chapter. Then it explores the reforms made by Turkey in this process and shows the past experience of the country with the harmonisation of the EU *acquis*. Lastly, it examines whether Turkey is legally required to adopt the Guidance as Guidelines in relation to Art.6 as part of its duty to harmonise its national competition law with the EU *acquis*. Section 4.2 observes that mostly because of the *sui generis* nature of the Guidance as a soft law instrument, Turkey's duty of harmonisation under the Decision No 1/95 of the EC-Turkey Association Council does not *de jure* require the country to transpose the Guidance into Turkish competition law.

Section 4.3 examines whether there is a need for Guidelines in relation to Art.6 in practice. This Section reports the findings of interviews carried out with (1) the internal staff of the TCA; (2) the lawyers who specialise in competition law cases in Turkey; (3) the judges within the 13<sup>th</sup> Chamber of the Council of State; and (4) the academics who have their research interests in Art.6 or have published widely on competition law in Turkey. Their practical experience together with their theoretical knowledge assists this Section in determining whether there is a need for Guidelines in relation to Art.6 in practice. Section 4.3 observes that while both the enforcers of Art.6 and the legal counsel of the undertakings as the addressees of Art.6 felt the need for Guidelines that would provide much-needed guidance in the enforcement of Art.6, the judges seemed rather reluctant to the adoption of Guidelines in relation to Art.6 and took the view that such Guidelines would have a limited impact on the judicial review of the Art.6 decisions of the TCA.

#### **4.1. Guidelines as Soft Law Instruments: The Functions of Guidelines**

##### **4.1.1. Providing Transparency and Predictability**

Almost every legal system has two different sets of legal instruments (legal norms) at its disposal depending on their legal force: Legally binding instruments (formal law) and non-binding legal instruments (informal law). A number of different legal instruments exist in different legal systems under different names. In EU law, Art.288 TFEU is the foundational provision listing the EU's legal instruments as "regulations, directives, decisions,

recommendations and opinions”.<sup>1</sup> In addition to “recommendations and opinions”, many different forms of non-binding legal instruments such as “Notices”, “Guidelines”, and “Frameworks” and so on also exist in EU law as “soft law”<sup>2</sup> instruments. Especially in the area of State aids, the Commission has published a wide variety of Guidelines setting out its policies in interpreting the scope of the related State aid provisions in the TFEU (Arts.107-109). Formal and informal law are commonly used together to develop Union policy and attain EU goals in any particular area.<sup>3</sup>

Guidelines elaborate the position of an enforcer on how it will interpret the governing legal norm(s).<sup>4</sup> As an example of soft law, Guidelines are issued to increase the transparency and predictability of enforcement action, usually in cases which are not specifically covered by formal law.<sup>5</sup> They are also used to consolidate the day to day decisional practice of an enforcer, since not all of its decisions may come to the notice of their addressees. Having a suitable set of Guidelines is important, as they can contribute towards predictability of actions and consistency of decisions.<sup>6</sup> Once certain rules are set out in Guidelines, it may become easier to identify enforcement activity which departs from those rules, thereby providing a further check on the transparency of the enforcer. More often than not, the adoption of Guidelines indicates a move towards better and more effective administration on the part of enforcers. The publication of Guidelines and useful

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<sup>1</sup> Pursuant to Art.288 TFEU; a regulation is binding in its entirety, a directive is binding upon to the relevant MS as to the result to be achieved, a decision is also binding in its entirety, but sometimes only on those to which it is specifically addressed. By contrast, recommendations and opinions have no binding force.

<sup>2</sup> Soft law can be defined as ‘rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects’. Senden, L. (2004) *Soft Law in European Community Law*, Hart Publishing, Great Britain, p.112.

<sup>3</sup> Craig, P. and De Búrca, G. (2011) *EU Law Text, Cases, and Materials*, 5<sup>th</sup> Edition, OUP, Italy, p.103. It has been argued that there has been an open acceptance of new techniques of governance, such as Commission communications, Green and White Papers, Notices, Guidelines, press releases, to create a consensus of what the Union policy should be, and how it should be achieved. Szyszczak, E. (2006) “Competition and the Liberalised Market”, in Shuibhne, N. N. (ed.), *The Regulation of the Internal Market*, Edward Elgar, Great Britain, p.90-92.

<sup>4</sup> Guidelines render public the procedure enforcers will follow, and the criteria and the evidence on which they will rely when approaching the subject matter of Guidelines. Dabbah, M. M. (2010) *International and Comparative Competition Law*, CUP, Great Britain, p.72.

<sup>5</sup> Guidelines provide greater transparency and predictability in the form of legal certainty to undertakings and their advisers. They ensure objectivity and limit an enforcer’s arbitrariness. Gormsen, L. L. (2010a) *A Principled Approach to Abuse of Dominance in European Competition Law*, CUP, United Kingdom, p.154.

<sup>6</sup> Vettas, N. and Kourandi, F. (2010) “On the Economics of Non-horizontal Mergers”, in Lianos, I. and Kokkoris, I. (eds.), *The Reform of EC Competition Law: New Challenges*, Kluwer Law International, Great Britain, p.493.

guides to procedure has been regarded as an ‘achievement’ on the part of the Commission in terms of creating a far greater measure of transparency for its work.<sup>7</sup>

However, better administration comes with the cost of a limited discretion enjoyed by enforcers. Once it has issued Guidelines, an enforcer wilfully forfeits its full discretion and is expected, or even bound, to exercise its discretion within the limits of those Guidelines. Although the EU Courts have endorsed the adoption of Guidelines by the Commission in its decisional practice,<sup>8</sup> they have nevertheless taken the view that by adopting and publishing Guidelines, the Commission ‘imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations.’<sup>9</sup> It was made clear that although Guidelines may not be regarded as rules of law which the Commission is always bound to observe, they may produce ‘legal effects’ ‘on certain conditions and depending on their content’.<sup>10</sup>

#### **4.1.2. Increasing Legal Certainty and Ensuring Compliance**

In addition to the transparency and predictability they create, Guidelines may increase legal certainty for their addressees and ensure a high level of compliance with the law.<sup>11</sup> Guidelines may help its addressees to be knowledgeable about the current state of law in a particular area, as well as about the interpretation of the law by enforcers and the likely administrative action they will take in situations defined in their Guidelines. Guidelines may thus guide the future behaviour of their addressees with a view to ensuring their

<sup>7</sup> Goyder, J. and Albors-Llorens, A. (2009) *EC Competition Law*, 5<sup>th</sup> Edition, OUP, Great Britain, p.621.

<sup>8</sup> Case T-214/95 *Vlaamse Gewest v Commission* [1998] ECR II-717, para.89 (‘The adoption of... guidelines by the Commission is an instance of the exercise of its discretion and requires only a self-imposed limitation of that power...’) and Case C-409/00 *Spain v Commission* [2003] ECR I-1487, para.69 (‘The Commission is of course entitled to take the view, in the notices and guidelines that it draws up in accordance with the Treaty and in the exercise of its discretion...’).

<sup>9</sup> Case C-189/02 P *Dansk Rørindustri and others v Commission* [2005] ECR I-5425, para.211.

<sup>10</sup> *ibid* at paras.209-211. See also Case C-167/04 *JCB Service v Commission* [2006] ECR I-8935, para.209 (‘Guidelines... determine, generally and abstractly, the method which the Commission *has bound itself to use*...’) (emphasis added). Especially in the specific area of supervision of State aids, the EU Courts have accepted that the Commission is bound by the Guidelines and Notices it has issued insofar as they do not depart from the rules in the Treaty and are accepted by the MSs. See Case C-91/01 *Italy v Commission* [2004] ECR I-4355, para.45, and Joined Cases C-75/05 and C-80/05, *Germany and others v Kronofrance SA* [2008] ECR I-6619, para.61.

<sup>11</sup> See Vettas and Kourandi (2010), p.479 (‘By making the treatment of cases more predictable and increasing consistency among decisions in different cases, Guidelines have the goal of reducing legal uncertainty for the parties.’).

compliance and reducing their compliance costs. On the other hand, those who rely on Guidelines in an attempt to act effectively within the scope of legality expect that the criteria or legal tests set out in those Guidelines have been correctly interpreted and applied by enforcers. This may give rise to “legitimate expectations” on the part of the addressees of Guidelines, and the question as to how far their expectations will be protected in the eye of law gains significance.

Increased legal certainty and compliance again comes with the cost of a limited discretion enjoyed by enforcers in that they may not easily depart from their Guidelines once these are published and announced to their addressees. Departures from Guidelines, where not justified with convincing evidence, may make the enforcement less predictable and lead to an unnecessary confusion amongst the addressees of those Guidelines. As a result of the inconsistency arisen out of unjustified departures, Guidelines may eventually fail to serve the functions intended by their publication. In EU law, the EU Courts have opted for the protection of legitimate expectations<sup>12</sup> as they have taken the view that the Commission cannot depart from its Guidelines in an individual case without giving reasons that are compatible with the principle of equal treatment and the protection of legitimate expectations.<sup>13</sup> The Commission’s failure to adhere to its policy it has set out in its published Guidelines may result in the annulment of its decisions.<sup>14</sup>

#### 4.1.3. Shaping the Law

For Guidelines to serve the functions intended by their publication, the relation between the content of Guidelines and case law is of significance. Normally Guidelines describe the current decisional practice and case law on a particular area, but they can also provide

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<sup>12</sup> It is settled case law in EU law that the right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation where the EU authorities have caused them to entertain legitimate expectations. Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products v Commission* [1987] ECR 1155, para.44; Case C-152/88 *Sofrimport v Commission* [1990] ECR I-2477, para.26; and Case T-220/00 *Cheil Jedang Corp v Commission* [2003] ECR II-2473, para.33.

<sup>13</sup> Case C-189/02 P, *Dansk Rørindustri and others v Commission* [2005] ECR I-5425, para.209-211 and Case C-167/04 *JCB Service v Commission* [2006] ECR I-8935, para.208. See also Case T-23/99 *LR AF 1998 A/S v Commission* [2002] ECR II-1705, para.245 (‘...the Commission has created a legitimate expectation amongst undertakings that the criteria set out in that notice will be applied, and is now therefore bound to apply them.’).

<sup>14</sup> Bacon, K. (2009) “Compatibility of Aid - General Principles”, in Bacon, K. (ed.), *European Community Law of State Aid*, OUP, Great Britain, p.121.

detailed and extensive analysis of the interpretative methodology to be used in enforcing the legal provisions.<sup>15</sup> In other words, they may not be a simple restatement of the existing case law. In many cases, Guidelines merely codify an enforcer's existing practice in the light of its experience gained through individual decisions in a particular field, rather than setting out completely new policies.<sup>16</sup> However, they can also diverge from the case law for instance when the enforcer perceives some judgments as misguided and may deem it as necessary to introduce new concepts, such as particular economic theories, which have not yet been the subject of substantial discussion in judicial settings.<sup>17</sup>

It has been argued that Guidelines are a far more significant part of the antitrust legal development process than their technical status as mere non-binding guides for prosecutorial discretion would suggest.<sup>18</sup> Accordingly, they have an important influence in refining, revising and rejecting the existing case law. Refining Guidelines can clarify a complex legal analysis or interpolate between rulings.<sup>19</sup> A revision involves changes that are more substantial than refinements but in which the Guidelines remain somewhat consistent with some existing case law.<sup>20</sup> Quite controversially, Guidelines may also diverge substantially from the law by rejecting the law.<sup>21</sup> The appropriateness of the last function of Guidelines was fiercely debated in the EU when the Guidance was found to have ignored the case law of the EU Courts and the Commission was accused of distorting the case law to make it fit the new interpretation of Art.102.<sup>22</sup>

#### **4.1.4. Guidelines in the Example of Turkey**

In the Turkish legal system; acts (statutes), statutory decrees, regulations, by-laws, communiqués and other legally binding instruments comprise formal law; while

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<sup>15</sup> Lianos, I. (2010) “‘Judging’ Economists: Economic Expertise in Competition Law Litigation: A European View”, in Lianos, I. and Kokkoris, I. (eds.), *The Reform of EC Competition Law: New Challenges*, Kluwer Law International, Great Britain, p.187.

<sup>16</sup> Bacon (2009), p.120.

<sup>17</sup> Greene, H. (2006) ‘Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse’, *William and Mary Law Review*, 48(3), p.780.

<sup>18</sup> *ibid* at p.777.

<sup>19</sup> *ibid* at p.828.

<sup>20</sup> *ibid* at p.829.

<sup>21</sup> *ibid*. Cf. Gormsen (2010a), p.159 (‘[G]uidelines are only valid if they do not conflict with the courts’ interpretation of the treaty provisions.’).

<sup>22</sup> See *supra* “3.1.2. Commentators’ Responses to the Guidance”.

instructions, guidelines, advanced rulings, opinions and other non-binding legal instruments under different fields of law comprise informal law. Guidelines are used especially in the context of competition law and the TCA has issued many Communiqués and Guidelines on different areas. In contrast to agreements and merger control on which the TCA has issued many Communiqués and Guidelines, there had been no formal or informal legal instrument in the area of abuse of a dominant position in Turkish competition law since April 2014. This naturally begged the question as to how this lack of a legal instrument on Art.6 could be justified considering the amount of Communiqués and Guidelines available on Arts.4 and 7 of the Act.<sup>23</sup>

One indication of a need for Guidelines is perhaps the expression of such a need by the stakeholders in the first place. The TCA explicitly stressed the need for Guidelines in relation to Art.6 in its recent Strategic Plan 2014-2018.<sup>24</sup> More importantly, this document points out that an increase in the number of Communiqués and Guidelines in Turkish competition law was expected by the consultancy firms, law offices, lawyers, academics, non-governmental organisations, consumer groups and some undertakings in Turkey who were consulted by the TCA for the purposes of this document.<sup>25</sup> The need for Guidelines in relation to Art.6 was also mentioned by the President of the TCA in the President's 2014 Message.<sup>26</sup> In addition, the State Supervisory Council recommended the adoption of Guidelines in relation to Art.6 with a view to 'aligning Turkish competition law with the

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<sup>23</sup> Art.4 prohibits agreements and concerted practices between undertakings, and decisions of association of undertakings which have as their object, effect or potential effect the prevention, distortion or restriction of competition within the market. Art.7 prohibits mergers and acquisitions which create or strengthen the dominant position of one or more of the parties and as a result of which effective competition in the market is significantly impeded.

<sup>24</sup> Available in Turkish at <<http://www.rekabet.gov.tr/tr-TR/Guncel/2014-2018-Rekabet-Kurumu-Stratejik-Plani-yayimlandi>> [accessed 30/09/2014], p.48 ('There are uncertainties in areas such as market definition, determination of dominant position, standards on exclusionary abuses and competition harm. For this reason [the TCA] should develop policies and standards through decisions and Guidelines, share them with public and provide predictability for undertakings... it will be beneficial to prepare and publicise Guidelines regarding the assessments on Art.6.').

<sup>25</sup> *ibid* at p.24-27.

<sup>26</sup> Available in Turkish at <<http://www.rekabet.gov.tr/tr-TR/Sayfalar/Baskanin-2014-Mesaji>> [accessed 30/09/2014] ('It is envisaged that our efforts regarding the formation of secondary legislation will continue in the same way. In continuation of our earlier efforts, the publication of Guidelines concerning exemption and dominant position... is envisaged in 2014.').



EU *acquis*, increasing legal certainty for undertakings and ensuring an effective enforcement of the Act'.<sup>27</sup>

Having been issued in April 2014, the Guidelines on Art.6 will provide guidance on how the TCA will analyse abuse of a dominant position cases.<sup>28</sup> The legal assessments that the TCA will make and the administrative actions that it will take under the Guidelines on Art.6 will provide transparency and predictability, and eventually lead to a better and more effective administration on the part of the TCA. In addition, the Guidelines on Art.6 will increase legal certainty in the area of abuse of a dominant position and will be likely to lead to a higher level of compliance on the part of dominant undertakings who will have more and better information as to which practices can potentially amount to an abuse and how their conduct is likely to be assessed by the TCA. The Guidelines on Art.6 will also provide guidance to competitors and customers of dominant undertakings, as well as consumers, when bringing their claims before the TCA and the appellate courts.

On the other hand, the Guidelines on Art.6 will result in a voluntary limitation on the discretion of the TCA which will be expected, or obliged, to exercise its discretion within the framework of its Guidelines in line with general legal principles and the principle of legitimate expectations. The TCA will be in a position to avoid as much derogation as possible and will have to explain why it has intended to depart from its methodology or rules in the particular case. Also the Guidelines on Art.6 may incentivise rapporteurs within the TCA to deliver consistent opinions (which may then give rise to consistent decisions when approved by the TCA) in similar cases since they will be able to rely on one single document instead of having had to examine the entire case law having different outcomes on the subject matter they are dealing with. Within this context, they can eventually be helpful in minimising inconsistencies in decisions of the TCA.<sup>29</sup> Therefore,

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<sup>27</sup> Available in Turkish at <<http://www.tccb.gov.tr/ddk/ddk38.pdf>> [accessed 30/09/2014].

<sup>28</sup> Pursuant to para.3 of the Guidelines on Art.6, 'the purpose behind the publication of these Guidelines is to explain the factors that the Board will take into account in applying Art.6 to abusive exclusionary conduct, to increase transparency and thus to minimise the uncertainties in the interpretation of the Article by the undertakings. To this end, these Guidelines aim to provide guidance not only to undertakings in a dominant position on certain a market, but also to their competitors, customers or suppliers.'

<sup>29</sup> On the problem of inconsistency in the decisions of the TCA, see *infra* "4.3. Guidelines on Art.6 in Practice" and Chapter 5.

the cost arising out of limited discretion is theoretically expected to be outweighed by the benefit of consistency in decisions and increased legal certainty for undertakings.

## **4.2. The Impact of Turkey's Commitments to the EU on Adopting Guidelines in Relation to Art.6**

### **4.2.1. Accession of Turkey to the EU and Competition Law as a Negotiation Chapter**

The relations between Turkey and the EU started with Turkey's application for associate membership to the then European Economic Community (EEC) in 1959.<sup>30</sup> An association agreement, commonly known as the "Ankara Agreement", was signed between the parties in 1963 and went into force in 1964.<sup>31</sup> In the integration process of Turkey to the EU, the Ankara Agreement envisaged mainly three stages: a preparatory stage, a transitional stage and a final stage.<sup>32</sup> With the completion of the preparatory stage, the Additional Protocol was signed in 1970 preparing the ground for further integration.<sup>33</sup> At the end of the transitional stage, the establishment of a Customs Union between the EEC and Turkey was planned as the final stage. On 6 March 1995, the EC-Turkey Association Council<sup>34</sup> issued the "Decision No 1/95" which created the Customs Union as effective from 31 December 1995.<sup>35</sup>

After the Customs Union, the eventual goal of Turkey became the membership to the EU as envisaged under Art.28 of the Ankara Agreement. A new era in EU-Turkey relations began after the European Council's Helsinki Summit of December 1999 when Turkey was formally recognised as a "candidate country" for EU membership. At the Brussels Summit of December 2004, the European Council acknowledged Turkey's

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<sup>30</sup> For a good comprehensive history of EU-Turkey relations, see Akçay, B. and Büyüktanır, D. (2013) "Changing Dynamics of Turkey-EU Relations", in Akçay, B. and Akipek, Ş. (eds.), *Turkey's Integration into the European Union*, Lexington Books, USA, p.1-30.

<sup>31</sup> Agreement establishing an Association between the European Economic Community and Turkey (signed at Ankara, 12 September 1963) [1964] OJ L217/3687.

<sup>32</sup> *ibid*, Art.2(3).

<sup>33</sup> Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force [1972] OJ L293/4. Entered into force on 1 January 1973, this Protocol was a supplement to the Ankara Agreement detailing the conditions, rules and timetables for the implementation of the transitional stage.

<sup>34</sup> Having been formed under Art.22 of the Ankara Agreement, the Council of Association is empowered to make decisions in order to attain the objectives of this Agreement.

<sup>35</sup> Decision No 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union [1996] OJ L35/1.

progress in fulfilling the “Copenhagen Criteria” and defined the conditions for the opening of accession negotiations. In October 2005, the European Council adopted a Negotiating Framework which set out the principles governing the negotiations between the parties, thus formal accession negotiations for full membership were officially launched. As part of becoming a member of the EU, Turkey was required to harmonise its national legislation with the EU *acquis* which was split up into 35 negotiation chapters.<sup>36</sup>

One of those negotiation chapters is related to competition (“8-Competition Policy”).<sup>37</sup> Within the framework of the association regime, Turkey was required to put in place the necessary measures for the application of competition rules in the relevant Treaties. To this end, the Ankara Agreement indicated that principles laid down in the provisions on competition of the EEC Treaty must be made applicable in the association regime.<sup>38</sup> The Additional Protocol envisaged that the EC-Turkey Association Council would adopt the conditions and rules for the application of the principles laid down in Arts.85, 86 and 90 of the EEC Treaty (now Arts.101, 102 and 106 TFEU).<sup>39</sup> The Decision No 1/95 obligated Turkey to adopt a domestic competition legislation and to approximate the substantive competition provisions of the EC Treaty. According to Art.39 of the Decision No 1/95:

‘(1) With a view to achieving the economic integration sought by the Customs Union, Turkey shall ensure that its legislation in the field of competition rules is made compatible with that of the European Community, and is applied effectively.

(2) To comply with the obligations of paragraph 1, Turkey shall

(a) before the entry into force of the Customs Union, adopt a law which shall prohibit behaviours of undertakings under the conditions laid down in Articles 85 and 86 of the E.C. Treaty. It shall also ensure that, within one year after the entry into force of the Customs Union, the principles contained in block exemption regulations in force in the Community, as well as in the case law developed by E.C. authorities, shall be applied in Turkey...’

As can be seen, Turkey undertook to ensure that competition legislation in Turkey operates effectively and in compliance with EU competition law. To this end, Turkey was

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<sup>36</sup> As of September 2014; 14 chapters have been opened, 1 chapter has been provisionally closed, 17 chapters have been blocked by some MSs and the remaining 3 chapters are yet to be opened. For up-to-date information on the status of negotiation chapters, see <<http://www.mfa.gov.tr/relations-between-turkey-and-the-european-union.en.mfa>> [accessed 30/09/2014].

<sup>37</sup> Competition law is one of the main areas covered by association agreements the EU enters into with countries within and outside Europe, and is usually given an important supporting role: To support efforts towards cooperation or integration. Dabbah (2010), p.209.

<sup>38</sup> The Ankara Agreement, Art.16.

<sup>39</sup> The Additional Protocol, Art.43.

*inter alia* obliged to enact national rules prohibiting agreements having as their object or effect the restriction, prevention or distortion of competition, and abuse of a dominant position.<sup>40</sup> In order to fulfil its obligations towards the EU, Turkey enacted the Act on the Protection of Competition 1994. Adoption of competition law was a response to international obligations instead of internal factors within Turkey. Majority of the Turkish commentators take the view that the main driving force behind the enactment of this Act was Turkey's legal duty to harmonise its domestic law with the EU *acquis* under the association regime.<sup>41</sup> The Act borrowed extensively from the EU as the operative language of its provisions closely mirrors that of the competition provisions in the EU Treaties.<sup>42</sup>

#### **4.2.2. Reforms in the Accession Process: Implications from Turkey's Previous Adoption of EU Block Exemption Regulations and Guidelines**

The Decision No 1/95 indicates a high degree of harmonisation of the competition legislation in Turkey with that of the EU with a view to achieving an economic integration. The Decision is intended to ensure that Turkey has the necessary legislative framework in place, one that is compatible with the EU *acquis*. As shown above, Art.39 of the Decision No 1/95 imposes an obligation on Turkey to adopt national provisions in line with Arts.85 and 86 EEC (now Arts.101 and 102 TFEU). In addition, the Article also obligates Turkey to transpose the principles contained in block exemption Regulations of the EU, as well as to harmonise the case law of the EU Courts. Furthermore, Art.39 also refers to "Community frameworks and guidelines" in the context of State aids as part of Turkey's

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<sup>40</sup> Decision No 1/95, Arts.32-33.

<sup>41</sup> Aydın, U. (2012) 'Between Domestic Factors and the EU: Explaining the Emergence of the Turkish Competition Regime', *Antitrust Bulletin*, 57(2), p.327-328 ('The main factor in 1994 that led to the adoption of the Law... was the immediate pressure of Customs Union negotiations... Without the benefits expected from the Customs Union with the EU, pressure from business interests or lack of political will and interest would have delayed the adoption of the law, or watered it down significantly. '); Anık, G. (1997) 'Competition Rules of Turkey', *European Competition Law Review*, 18(5), p.311 ('[T]he Customs Union Agreement was a powerful influence on the enactment of this Act... '); Kulaksızoğlu, T. (2004) "Competition Policy in Turkey", MPRA Paper No: 179, <<http://mpa.ub.uni-muenchen.de/179/>> [accessed 30/09/2014], p.38 ('...Turkey would not have adapted a competition policy this soon if it was not for the effort to become integrated to the European Union. '); and Öz, G. (1999) 'Competition Law and Practice in Turkey', *European Competition Law Review*, 20(3), p.149 ('[T]he Association Agreement between Turkey and the EEC had a significant impact in the course of drafting of the Law. ') (citations omitted).

<sup>42</sup> See generally Doleys, T. J. (2012) 'Promoting Competition Policy Abroad: European Union Efforts in the Developing World', *Antitrust Bulletin*, 57(2), p.338 ('[I]t is generally accepted that core substantive provisions of the newly reformed regime were inspired by corresponding provisions in EU competition law. ').

duty of harmonisation.<sup>43</sup> Therefore Turkey was required to transpose into its domestic legal order almost the entirety of EU competition law.<sup>44</sup>

To this end, the TCA has kept up with developments in EU competition law by following the Commission's secondary legislation and the case law of the EU Courts. It has adopted many block exemption Regulations applicable in the EU and transposed them into Turkish competition law in the form of Communiqués. In this respect, the TCA issued the Communiqué on the Mergers and Acquisitions Requiring the Authorisation of the Turkish Competition Authority 1997/1,<sup>45</sup> Vertical Agreements Block Exemption Communiqué 2002/2, Research and Development Agreements Block Exemption Communiqué 2003/2, Block Exemption Communiqué on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector 2005/4, Technology Transfer Block Exemption Communiqué 2008/2, Block Exemption Communiqué in Relation to the Insurance Sector 2008/3 and Specialisation Agreements Block Exemption Communiqué 2013/3. The TCA has also issued other Communiqués in relation to procedural<sup>46</sup> and domestic issues.<sup>47</sup>

Especially in recent years, the TCA has been very active in issuing Guidelines in various areas. Some of those Guidelines are inspired by their counterparts in EU competition law such as Guidelines on the Definition of the Relevant Market 2008, Guidelines on Technology Transfer Agreements 2009, Guidelines on Vertical Restraints 2009, Guidelines on Horizontal Cooperation Agreements 2013, Guidelines on the Assessment of Horizontal Mergers 2013, Guidelines on the Assessment of Non-horizontal

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<sup>43</sup> Art.39(2)(c)-(f). It should be noted that transposition of "Guidelines" is envisaged only in the context of State aids, but not in the context of Arts.85 and 86 EEC (now now Arts.101 and 102 TFEU). This can be explained by the wide usage of Guidelines in EU State aid law *vis-à-vis* the existence of few Guidelines on Arts.85 and 86 EEC during the early 1990s. Nevertheless, the fact that "Guidelines" are not enumerated in the context of Arts.85 and 86 EEC is liable to give rise to a debate as to whether Turkey's duty of harmonisation also extends to Guidelines in the area of Arts. 101 and 102 TFEU. While the outcome of debate is of practical importance, for the purposes of this thesis, such debate is irrelevant because of the fact that the Guidance is not "Guidelines" from a legal point of view. See also *infra* "4.2.3. The Transposition of the Guidance vis-à-vis Turkey's Duty of Harmonisation with the EU *Acquis*".

<sup>44</sup> Geradin, D. (2004) *Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries*, World Bank Working Paper No 35, World Bank, Washington DC, p.47.

<sup>45</sup> This Communiqué is replaced by the Communiqué on the Mergers and Acquisitions Requiring the Authorisation of the Turkish Competition Authority 2010/4.

<sup>46</sup> See, for example, Communiqué on Oral Hearings before the Competition Board 2010/2 and Communiqué on Access to File and Protection of Trade Secrets 2010/3.

<sup>47</sup> See, for example, Communiqué on Procedures and Principles in Pre-notification and Authorisation of Acquisitions via Privatisation 2013/2.

Mergers 2013 and Guidelines on the General Principles of Exemption 2013. The TCA has also issued other Guidelines, mostly in the area of merger control.<sup>48</sup> The recent practice of the TCA to issue Guidelines is modelled on the Commission's practice of issuing Guidelines to guide undertakings.<sup>49</sup> Following the imprints left by the European legal framework, the TCA is developing its own voice in enhancing legislative framework.<sup>50</sup>

The abovementioned Communiqués and Guidelines demonstrate that Turkey has a fair track record of transposing the EU *acquis*. The TCA has transposed all of the EU block exemption Regulations into Turkish competition law and has been especially active in recent years in complementing the secondary legislation with soft law instruments. It is noteworthy that the vast majority of the abovementioned Communiqués and Guidelines relate to Art.4 and Art.7 of the Act. Abuse of a dominant position was the only area which was left without any formal or informal piece of guidance. Before the publication of the Guidelines on Art.6 in April 2014, it was expected that the TCA would also issue Guidelines in relation to Art.6 considering its previous adoption of EU block exemption Regulations and Guidelines. Eventually, the TCA's growing trend to adopt Guidelines in recent years has paved the way for the issue of the Guidelines on Art.6.

#### **4.2.3. The Transposition of the Guidance vis-à-vis Turkey's Duty of Harmonisation with the EU *Acquis***

Considering Turkey's duty to harmonise its domestic competition law with the entire body of EU competition law, the question as to whether Turkey as an official candidate for EU membership is legally obliged under the association regime to adopt the Commission's Guidance as Guidelines in relation to Art.6 gains importance. As discussed in Chapter 3, the Guidance is primarily related to the Commission's own enforcement in dealing with the complaints and informs about the future administrative practice of the Commission in the context of Art.102. Unlike the earlier documents in the modernisation of Art.102, the

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<sup>48</sup> See, for example, Guidelines on Mergers and Acquisitions and the Concept of Control 2013; Guidelines on the Acceptable Remedies in Mergers and Acquisitions 2011; and Guidelines on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions 2011.

<sup>49</sup> Öz, G. (2013) "Competition Law in Turkey From Association to Accession", in Akçay, B. and Akipek, Ş. (eds.), *Turkey's Integration into the European Union*, Lexington Books, USA, p.57.

<sup>50</sup> Gürkaynak, G. and Durlu, D. (2011) 'From Mergers to Cartels: An Overview of the Rapidly Evolving Turkish Competition Law in Light of the European Model', *Journal of European Competition Law & Practice*, 2(3), p.276.

Guidance has enforcement status but is not intended to constitute a statement of law. It is in no way legally binding on the EU Courts and on the MSs. It follows that it is *a fortiori* not binding on the TCA or on the Turkish Appellate Courts either.

In this respect, the status of the Guidance in the context of the accession regime needs to be explored. First of all, the Guidance is not a “Block Exemption Regulation on the Application of Art.102”. According to its title, it is “*Guidance* on the Commission’s enforcement priorities” and is thus primarily related to the Commission’s own enforcement activity in applying Art.102. Second, the Guidance is not labelled as “Guidelines” either. Legally it is a “*Communication from the Commission*” instead of a “*Notice*”. For these reasons, it has been argued that the Guidance represents an ‘atypical’ or ‘unusual’ form for a soft law instrument.<sup>51</sup> Accordingly, the Guidance has a *sui generis* nature as a legal instrument in EU competition law which is ‘not recognised in any of the legislative acts as set out in the EU Treaties’.<sup>52</sup> It follows that from a legal point of view, the Guidance does not qualify as a block exemption Regulation or as Guidelines, and therefore does not come within the scope of Art.39(2)(a) of the Decision No 1/95.

On the other hand, the same Article obligates Turkey to apply the principles contained in ‘the case law developed by the [EU] authorities’. Also, pursuant to Art.35 of the Decision No 1/95;<sup>53</sup> the illegality of agreements, abuse of a dominant position and State aids under the association regime shall be assessed on the basis of criteria arising from the application of relevant competition provisions of the EU Treaties, as well as secondary legislation of the EU. In other words; the founding Treaties, Regulations, Notices and other legal instruments in EU competition law will be the primary source for the interpretation of the national law concerning agreements, abuse of a dominant position and State aids. Evidently, as far as Art.35 is concerned, Turkey’s national law on abuse of a dominant position should be in harmony with the statutory law on this area in the EU. Failure to assess unilateral conduct on the basis of criteria arising from the application of the rules of

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<sup>51</sup> See *supra* “3.1.2. Commentators’ Responses to the Guidance”.

<sup>52</sup> O’Donoghue, R. and Padilla, J. (2013) *The Law and Economics of Article 102 TFEU*, 2<sup>nd</sup> Edition, Hart Publishing, Great Britain, p.75.

<sup>53</sup> Art.35 reads as follows: ‘Any practices contrary to Articles 32, 33 and 34 shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Community and its secondary legislation.’

Art.102 in Guidelines in relation to Art.6 in Turkey will result in a breach of Art.35 of the Decision No 1/95.

Because of the *sui generis* nature of the Guidance as a soft law instrument, it does not qualify as a piece of “secondary legislation” as envisaged in Art.35 either.<sup>54</sup> This means that from a legal point of view Turkey is not required to implement the Commission’s new reading of Art.102 in the Guidance so long as it departs from the case law of the EU Courts, which is instead given the real importance under Art.39(2)(a). Therefore, the dilemma of following the tide towards the Commission’s new reading of Art.102 so as to keep up with the developments in modern economic thinking on unilateral conduct versus abiding by the case law of the EU Courts on Art.102 so as to be “on the safe side” is also the case with Turkey in transposing the Guidance into Turkish competition law. Though the Guidance is still expected to provide a useful point of reference for the MSs which are not allowed under Art.16 Regulation 1/2003 to take decisions running counter to Commission decisions,<sup>55</sup> Turkey is currently an official candidate for EU membership. Since Turkey is yet to become a MS, this argument does not help Turkey to use the relevant Article in Regulation 1/2003 as a potential basis for transposing the Guidance either.

Consequently, Turkey’s duty of harmonisation with the EU *acquis* does not *de jure* require the country to transpose the Guidance into Turkish competition law because the Guidance does not qualify as a block exemption Regulation, not even as Guidelines, within the meaning of Art.39(2)(a) of the Decision No 1/95. While Art.35 of the Decision No 1/95 does *de jure* obligate Turkey to interpret its national law on abuse of a dominant position in harmony with the EU treaties and secondary legislation in the same area, the Guidance does not fall into the scope of this Article either. Under these circumstances, one can reasonably argue that the Guidance *can* be used as a model when preparing Guidelines in relation to Art.6 in Turkey, rather than *should* be used in this respect. As Chapter 5 will show, the Guidance has actually been used as a model by the TCA and the substantive content of the Guidance is firmly followed throughout the Guidelines on Art.6. After all considering the TCA’s efforts on the alignment of the enforcement of Art.6 with the Commission’s new

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<sup>54</sup> One thing that deserves mention is that the Guidance was published in “C series” of the OJ, which include information and Notices, as opposed to “L series” which denote legislation.

<sup>55</sup> See *supra* “3.3.1. Initial Expectations from the Post-Guidance Period”.



reading of Art.102 even before the Guidelines on Art.6 came out,<sup>56</sup> it was highly unlikely for the Guidelines on Art.6 to show pivotal differences from its EU counterpart.

### **4.3. Guidelines in Relation to Art.6 in Practice**

#### **4.3.1. Observations of the Internal Staff of the TCA**

First of all, the members of internal staff of the TCA were asked about their opinion on the current state of case law of the TCA and the Council of State on Art.6 as to whether it was clear and consistent or in need of reform. All interviewees within this group replied that the case law of the TCA was inconsistent; not even one interviewee argued otherwise.

One senior competition expert summarised the state of the decisions of the TCA as follows:

‘Our decisions are being widely criticised outside [the TCA]. I agree with those criticisms. Decisions are in conflict with each other. A robust body of case law has not been developed. Decisions do not follow each other on a regular basis. When there is a change in the case law, the reasons for such is often not explained... Depending on the rapporteurs, different expressions are being used in decisions.’<sup>57</sup>

One member of the commission that prepared the Guidelines on Art.6 expressed that:

‘Unfortunately when we look at the past decisions, we do not see a consistent body of cases. For example, one decision requires a specific set of conditions for a certain type of abuse, whereas another decision requires a different set of conditions for that abuse... Recent decisions are relatively more consistent.’<sup>58</sup>

Evaluating the decisions of the TCA, one competition expert noted that:

‘The biggest problem with the decisions of the TCA is the problem of consistency and thus the serious conflicts amongst decisions in terms of both the approach and the results...’<sup>59</sup>

Drawing attention to a different subject, another member of the commission that prepared the Guidelines on Art.6 noted that:

‘When we look at the expertise theses [of the competition experts within the TCA], we see that majority of those theses pointed to a need for a consistent body of decisions... The biggest problem is the lack of inconsistency in practice.’<sup>60</sup>

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<sup>56</sup> See Chapter 5.

<sup>57</sup> Anonymous interviewee, 20/02/2014, Ankara.

<sup>58</sup> Anonymous interviewee, 04/03/2014, Ankara.

<sup>59</sup> Anonymous interviewee(1), 19/03/2014, Ankara.

<sup>60</sup> Anonymous interviewee(2), 21/02/2014, Ankara.

Second, with the exception of one interviewee,<sup>61</sup> all of the interviewees found that the case law was not clear either.

One competition expert expressed that:

‘We all know that decisions are not sufficiently clear.’<sup>62</sup>

Third, not all interviewees touched on the issue of reform in their replies. Majority of those who considered this issue responded that a reform was needed in this respect<sup>63</sup> with the exception of two interviewees who noted that there is no need for a reform despite the current state of the case law.<sup>64</sup>

Making a comparison with the EU, one competition expert observed that:

‘Reform is not needed, but the case law is nevertheless not clear. However, this is not peculiar to Turkish competition law. This is the same in the US and the EU... This area rather needs to be explained and I can say that there is unanimity on this.’<sup>65</sup>

Likewise not all interviewees considered the state of the judgments of the Council of State in their replies, but those who did so noted that the issue with those judgments was not the fact that they were inconsistent or unclear; instead the real problem was that they were far from providing any guidance on Art.6.<sup>66</sup>

One competition expert explained that:

‘We see that generally Danıştay does not deal with substantive issues in the decisions [of the TCA]. For this reason, it is impossible to speak of detailed analyses in relation to Art.6 or of consistency. As a member of staff, I can say that the judgments of Danıştay are not sufficiently helpful to me in my cases. Therefore, we can say that the judgments of Danıştay are inconsistent and need some clarification.’<sup>67</sup>

Another competition expert claimed that:

‘The judgments of Danıştay are in no way guiding... [It] does not list the necessary conditions for a particular type of conduct to amount to an infringement...’<sup>68</sup>

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<sup>61</sup> Anonymous interviewee(1), 25/04/2014, Ankara.

<sup>62</sup> Anonymous interviewee, 03/04/2014, Ankara.

<sup>63</sup> Anonymous interviewee, 21/02/2014, Ankara; anonymous interviewee(1), 21/02/2014, Ankara; anonymous interviewee(2), 21/02/2014, Ankara; anonymous interviewee, 14/03/2014, Ankara.

<sup>64</sup> Anonymous interviewee, 27/02/2014, Ankara; anonymous interviewee, 03/04/2014, Ankara.

<sup>65</sup> Anonymous interviewee, 03/04/2014, Ankara.

<sup>66</sup> Anonymous interviewee(1), 21/02/2014, Ankara; anonymous interviewee, 27/02/2014, Ankara; anonymous interviewee, 04/03/2014, Ankara; anonymous interviewee(2), 19/03/2014, Ankara.

<sup>67</sup> Anonymous interviewee, 04/03/2014, Ankara.

<sup>68</sup> Anonymous interviewee(2), 19/03/2014, Ankara.

With regard to the second interview question, the members of internal staff of the TCA were asked whether there was a need for Guidelines in relation to Art.6 or whether they felt the absence of such Guidelines based on their personal experience. Again all interviewees replied that there was a need for Guidelines in relation to Art.6; not even one interviewee argued otherwise. It is worth noting that most interviewees used words like “absolutely”, “definitely” or “of course” to imply that there is a dire need of Guidelines in relation to Art.6. The most cited reasons for the issue of Guidelines in relation to Art.6 stood out as “consistency”, “predictability” and “fulfilling the gap on Art.6 which was the only area left without any guidance”.

One high-ranked official within the TCA illustrated that:

‘Absolutely there is a need for Guidelines. For example in the area of mergers and acquisitions there are Communiqués and Guidelines which are more or less guiding. People can understand things without Guidelines in this area. But it is hard to understand Art.6 without Guidelines. You claim that predatory pricing is an abuse, but you have to explain what a predatory price is, which cost benchmarks are used, whether it directly amounts to an abuse when you sell below costs, for how long it should last etc... Guidelines are a must.’<sup>69</sup>

Another high-ranked official explained that:

‘In the absence of Guidelines, there would only be our past decisions. Of course we benefit from the literature when available, but most of the time we rely on our decisions. There may be inconsistencies in our decisions or our decisions may not be adequately guiding. This of course creates controversies and makes it difficult for our rapporteurs to write their decisions... Some guidance is necessary.’<sup>70</sup>

One other high-ranked official highlighted their reasons for adopting Guidelines in relation to Art.6 as follows:

‘Guidelines have benefits... Sometimes the members [of the Competition Board] change. The new members may have different approaches. They may not be aware of the past decisions. Guidelines will thus provide consistency in the case law. Since Guidelines refer to past decisions, this will allow [competition] experts to see how the case law has been developed. There are also inconsistencies among experts, not just the members... Guidelines are needed to ensure consistency.’<sup>71</sup>

One competition expert strongly advocated for the adoption of Guidelines in relation to Art.6 by stating that:

‘When we look at the enforcement of the TCA, in areas such as procedure, fining, Art.4 or Art.7, different pieces of secondary legislation have been prepared in order to provide predictability. On this point, we can say that there is a lack of [guidance] in terms of Art.6... I definitely think that there is [a need for Guidelines]. As a member of staff, I do not know which criteria are taken into account when the

<sup>69</sup> Anonymous interviewee, 26/03/2014, Ankara.

<sup>70</sup> Anonymous interviewee, 24/02/2014, Ankara.

<sup>71</sup> Anonymous interviewee, 27/02/2014, Ankara.

[Competition] Board assesses the abuse “X”. I look at the decision “A” and there are four criteria. I look at the decision “B” and there are four different criteria. Therefore, in order to solve this problem, there is a need for Guidelines....<sup>72</sup>

Another competition expert expressed that:

‘For both enforcers... and undertakings as the addressees of the Act, I actually think that there is a need for Guidelines in relation to Art.6 on what is an abuse, what is not an abuse, or how the allegation will be assessed and investigated.’<sup>73</sup>

One other competition expert stressed that:

‘I felt the need for Guidelines in every case I worked on.’<sup>74</sup>

The members of the internal staff of the TCA were further asked whether the Commission’s Guidance should be adopted or Turkey should publish its own Guidelines in relation to Art.6. By using similar words, all of the interviewees expressed that Turkey should publish its own Guidelines, but should nevertheless benefit from the Guidance and from the EU experience in this respect.

One senior competition expert said that:

‘I can well say that we have to take into account that [the EU experience], because they have a much more experience than we have. There are much more cases, expertise etc. Evidently we have to take this into account, but of course Turkey’s own circumstances should be considered as well.’<sup>75</sup>

One high-ranked official stressed that:

‘I am not a big fan of adopting [EU] Guidelines in their entirety. But their general framework needs to be adopted. The fundamental reason for this is the EU’s considerable experience on the subject.’<sup>76</sup>

Another high-ranked official expressed that:

‘We should get the utmost benefit from the EU Commission’s regulation [the Guidance], but we have to adapt it [to our needs], and take into account the situation of our sectors and our structural or cultural issues...’<sup>77</sup>

One competition expert stated that:

‘I have doubts about adopting it [the Guidance] in its entirety, because the wording of our Act and the established enforcement thus far differ. For this reason, I think we have to consider our own

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<sup>72</sup> Anonymous interviewee, 04/03/2014, Ankara.

<sup>73</sup> Anonymous interviewee(1), 19/03/2014, Ankara.

<sup>74</sup> Anonymous interviewee, 22/03/2014, Ankara.

<sup>75</sup> Anonymous interviewee, 20/02/2014, Ankara.

<sup>76</sup> Anonymous interviewee, 27/02/2014, Ankara.

<sup>77</sup> Anonymous interviewee, 24/02/2014, Ankara.

established case law, the wording of our Act etc. and make additions or alterations when necessary. Our draft Guidelines [on Art.6] were drafted accordingly.’<sup>78</sup>

Although all of the interviewees responded that Turkey should publish its own Guidelines which should be modelled on the Guidance, not all interviewees mentioned what those needs were.

Listing the needs of Turkey, one competition expert claimed that:

‘We have to start with answering the question as to whether the economic situations in the EU and in Turkey are the same. They are not... I like the rationale of the Guidance... but its full adoption, and translation is a serious problem... There is a need to make an adaptation between the rationale of the Guidance and the accounting standards, statistics in use, the conditions of undertakings and barriers to entry in Turkey.’<sup>79</sup>

One high-ranked official was of the opinion that:

‘There are not so many things to change in the Guidelines in Turkey... Maybe only the determination of dominant position may differ. Abuse is similar to the EU. Their [EU’s] experience is more or less the same.’<sup>80</sup>

Another high-ranked official briefly stated that:

‘We do not have to add the fundamentals to the Guidelines [on Art.6]... if the Guidelines include some controversial points, this will at least provide guidance...’<sup>81</sup>

Finally, the competition experts (Group 1(b)) among the internal staff of the TCA were additionally asked whether Guidelines in relation to Art.6 should be in the form of “enforcement priorities” just as the Guidance. Most of the interviewees who answered this question expressed that they should be in the form of “Guidelines”, while one interviewee insisted that it should set enforcement priorities just as the Guidance.

Taking a negative stance against enforcement priorities, one competition expert stated that:

‘Our Guidelines will be binding. I think that the EU’s Guidance is something that is stuck in the middle. It gives the impression like: “I think about this but it can also be this”. In order for our Guidelines to reach their goals, they should not be something that is stuck in the middle, but should be something binding.’<sup>82</sup>

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<sup>78</sup> Anonymous interviewee, 04/03/2014, Ankara.

<sup>79</sup> Anonymous interviewee, 22/03/2014, Ankara.

<sup>80</sup> Anonymous interviewee, 26/03/2014, Ankara.

<sup>81</sup> Anonymous interviewee, 27/02/2014, Ankara.

<sup>82</sup> Anonymous interviewee(2), 19/03/2014, Ankara.

One member of the commission that prepared the Guidelines on Art.6 explained that:

‘They called it the Guidance... Their hands were more tied, because there were detailed judgments. Because they had to take into account the formalistic judgments, they prepared it as enforcement priorities. However, we preferred ours to be Guidelines in format, since the judgments of Danıştay did not deal with substantive issues.’<sup>83</sup>

Another competition expert opted for Guidelines as follows:

‘For the moment, it is better to issue Guidelines... The decision to set enforcement priorities is related to competition policy rather than being a matter of law... Which infringements to prioritise, which sectors to prioritise... are the subject of competition policy... These have to be considered in a strategic plan first. This has pluses and minuses... I think Guidelines [on Art.6] do not serve the purpose of prioritisation, therefore they have been published in accordance with their own purpose.’<sup>84</sup>

On the other hand, one competition expert dissented that:

‘Because it is difficult to define the concept of abuse of a dominant position or monopolisation, it seems useful to set enforcement priorities. This will leave more discretion to competition authorities... and will provide some clarity for market players on the things the TCA considers and prioritises. Publishing in the form of Guidelines may be problematic.’<sup>85</sup>

#### **4.3.2. Observations of Lawyers**

To begin with, the lawyers who specialise in competition law cases in Turkey were asked about their opinion on the current state of case law of the TCA and the Council of State on Art.6 as to whether it was clear and consistent or in need of reform. All interviewees within this group replied that the case law of the TCA was inconsistent; not even one interviewee argued otherwise.

One lawyer stated that:

‘Unfortunately it is not clear or consistent... I think that the companies are in a terrible condition in terms of legal certainty and safety.’<sup>86</sup>

Another lawyer took the view that:

‘We cannot say that [the case law of the TCA is] so clear or consistent, we cannot say that this is peculiar to Turkey either.’<sup>87</sup>

Second, most lawyers also considered whether the case law was in need of reform and gave different reasons in this respect. Majority of the lawyers found that there was a

<sup>83</sup> Anonymous interviewee(1), 21/02/2014, Ankara.

<sup>84</sup> Anonymous interviewee(1), 25/04/2014, Ankara.

<sup>85</sup> Anonymous interviewee, 03/04/2014, Ankara.

<sup>86</sup> Anonymous interviewee, 19/06/2014, (email).

<sup>87</sup> Anonymous interviewee, 05/06/2014, Istanbul.

need for a reform. Among different interviewee groups, the lawyers were the only interviewees who were mostly concerned with a reform in the case law.

One lawyer argued that:

‘Based on the cases I am involved as a lawyer, I can say that there is certainly a need for a reform... I mean that rather than changing the rules, there is a need for reform because of some weaknesses on how the TCA and Danıştay achieve results with the facts in their decisions.’<sup>88</sup>

Another lawyer expressed that:

‘There is a need for reform on how the TCA will apply each subparagraph [of Art.6], the conditions it will consider, the tests it will apply and how it will use its discretion.’<sup>89</sup>

One other lawyer said that:

‘Sometimes it is possible to see conflicting decisions in relation to Art.6... For the question as to whether there is a need for reform, yes there is a need for reform within this context. In this respect, I think Guidelines are important.’<sup>90</sup>

Not all lawyers considered the state of the judgments of the Council of State in their replies, but those who did so noted that the issue with these judgments was not the fact that they were inconsistent or unclear; instead the real problem was that they were far from providing any guidance on Art.6.

One lawyer observed that:

‘Especially when we look at the judgments of Danıştay on competition law in general and on Art.6 in particular, we see that they do not have that much experience... I think we have to spend much more time for the judiciary to guide the TCA and provide some fundamental points of reference in its assessments of Art.6.’<sup>91</sup>

With regard to the second interview question, the lawyers were asked whether there was a need for Guidelines in relation to Art.6 or whether they felt the absence of such Guidelines based on their personal experience. Again all lawyers replied that there was a need for such Guidelines; no lawyer argued otherwise.

One lawyer explained that:

‘Yes, there is [a need for Guidelines]. Ultimately Art.6 is a short article consisting of subparagraphs and listing examples of abuse... For the undertakings to be in a position to know which of their practices are abusive and which of their practices are competitive; instead of individually analysing the TCA’s decisions and deriving some conclusions, I think it will be appropriate in terms of legal

<sup>88</sup> Anonymous interviewee, 28/02/2014, Ankara.

<sup>89</sup> Anonymous interviewee, 19/06/2014, (email).

<sup>90</sup> Anonymous interviewee, 16/04/2014, Ankara.

<sup>91</sup> Anonymous interviewee, 16/04/2014, Ankara.

certainty to include a summary of the TCA's decisions and of the outcome of those decisions in Guidelines.'<sup>92</sup>

Another lawyer provided good reasons as follows:

'The question as to what would happen if there were no Guidelines is somehow important. If there were no Guidelines; what kind of approach would be taken and how certainty would be provided as to whether the conduct is against the law etc. could only be determined by reviewing the past decisions of the TCA. But one of the very few points for which we can criticise the TCA is that there are weaknesses in terms of consistency of the law in its decisions... There are some detailed decisions of the TCA which thoroughly examine the subject in question, but in other cases we see that a certain approach that is adopted in one decision is abandoned in another decision, but we do not see any explanation on this difference between the former decision and the latter decision. In the absence of Guidelines, uncertainty would still remain in terms of shaping the law by only looking at the decisions. The existence of Guidelines is positive as it will transpose the case law into soft law.'<sup>93</sup>

Although no lawyer argued that there was no need for Guidelines in relation to Art.6, it can be observed that some lawyers specified the elements for which some form of guidance was needed and thus limited the content of such Guidelines.

One lawyer emphasised that:

'I do not think that there is a need for Guidelines on all aspects of Art.6. But for some specific types of abuses, Guideline would be appropriate. For instance, pricing abuses, predatory pricing or excessive pricing... loyalty-inducing rebates... or *de facto* exclusivity. However, for some types [of abuses] under Art.6, I do not think there is a need for a comprehensive guideline... [such as] refusal to deal...'<sup>94</sup>

Finally, the lawyers were further asked whether the Commission's Guidance should be adopted or Turkey should publish its own Guidelines in relation to Art.6. All lawyers expressed that Turkey should take into account the EU experience, but should still prepare its own Guidelines.

One lawyer was of the opinion that:

'I do not think that the exact translation of the Guidance would be meaningful... Evidently, the EU Regulations should be an example, but an exact copy does not seem right to me. In any case, we have 15 years of [competition] law enforcement in our country and there are many decisions as a result of that enforcement... Some principles can be derived from that.'<sup>95</sup>

Another lawyer drew attention to the fact that:

'On the one hand, we have a duty to adapt the EU rules to the country in the accession process. On the other hand... competition law is the result of competition policy, which is the result of a country's

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<sup>92</sup> Anonymous interviewee, 16/04/2014, Ankara.

<sup>93</sup> Anonymous interviewee, 28/02/2014, Ankara.

<sup>94</sup> Anonymous interviewee, 05/06/2014, Istanbul.

<sup>95</sup> Anonymous interviewee, 16/04/2014, Ankara.



economic policies... Where the domestic conditions differ from the EU, the content of Guidelines should differ accordingly.’<sup>96</sup>

One other lawyer insisted that:

‘Nothing can be adopted in their entirety any more... Rather than adopting in its entirety, it is best to filter according to our decisions... A little tailoring will be necessary.’<sup>97</sup>

#### 4.3.3. Observations of Judges

First of all, the judges within the 13<sup>th</sup> Chamber of the Council of State were asked as to whether the current state of case law of the TCA and the Council of State on Art.6 was clear and consistent or in need of reform. Contrary to what the internal staff of the TCA and the lawyers argued, there is no unanimity among the judges in that some judges expressed that the case law of the TCA was consistent, while other judges stated that it was inconsistent. The judges were silent on the second part of the first interview questions and thus did not state whether the case law was in need of reform.

One judge observed that:

‘With regard to the decisions of the TCA, there are a vast number of decisions. I cannot say that I have come across with inconsistent decisions of the TCA. Maybe there are some [inconsistent decisions] under Art.4... but I do not see a remarkable inconsistency with regard to Art.6.’<sup>98</sup>

Another judge expressed that:

‘When we look at the decisional practice of the TCA, it keeps up with the EU *acquis*. Even though there are inconsistencies, the decisions have been shaped in line with the EU enforcement.’<sup>99</sup>

Again unlike the internal staff of the TCA and the lawyers, some judges found that the case law of the Council of State was clear and consistent.

One judge took the view that:

‘Danıştay does not issue enough decisions, but we can say that the existing decisions are clear and consistent.’<sup>100</sup>

Second, the judges were asked whether there was a need for Guidelines in relation to Art.6 or whether they felt the absence of such Guidelines based on their personal experience. In sharp to contrast to what the internal staff of the TCA and the lawyers

<sup>96</sup> Anonymous interviewee, 28/02/2014, Ankara.

<sup>97</sup> Anonymous interviewee, 05/06/2014, Istanbul.

<sup>98</sup> Anonymous interviewee(1), 09/04/2014, Ankara.

<sup>99</sup> Anonymous interviewee(2), 09/04/2014, Ankara.

<sup>100</sup> Anonymous interviewee(1), 09/04/2014, Ankara.

responded, the judges did not think that there was a need for Guidelines in relation to Art.6, nor did they feel the absence of such Guidelines. All judges expressed that the main consideration in their judicial review was the Act itself and no soft law material was relevant for the purposes of judicial review.

One judge unequivocally expressed that:

‘There is no need for Guidelines at the level of judicial authorities. The fundamental norm is statutes... The absence of Guidelines does not affect our judicial review. We have never felt a need for Guidelines in relation to Art.6. Guidelines are legal instruments that show how the TCA will apply Art.6. We take into account the Act [on the Protection of Competition 1994]... if there are elements contrary to our interpretations, we will not be bound by Guidelines. Guidelines can never be the fundamental norm. They can only be an auxiliary norm. Guidelines only bind the TCA itself, restrain its discretion and may help us in reviewing whether it has exercised its discretion within the limits of the law and based on objective criteria. Other than that they are of no use to us.’<sup>101</sup>

Another judge argued similarly that:

‘Guidelines only bind the TCA. They may provide predictability and foreseeability for companies, and may be useful for companies. However, they do not bind the courts. We are not interested in whether the TCA has applied its Guidelines or not. If there is anything against the Act, that is our concern. We will not be bound by Guidelines. I review the decisions on the grounds of infringement of the Act or other secondary legislation, but not infringement of Guidelines.’<sup>102</sup>

Finally, the judges were asked the third interview question on the adoption of the Guidance or publication of Turkey’s own Guidelines in relation to Art.6. Similar to the internal staff of the TCA and the lawyers, all judges replied that Turkey should benefit from the Guidance, but should still publish its own Guidelines.

One judge said that:

‘The enforcement of the TCA is already parallel to the EU. If we are to say that we should depart from the EU in the context of Guidelines in relation to Art.6, this will not be logical. The best way is of course to prepare [Guidelines in relation to Art.6.] by taking into account the conditions that are peculiar to us, the decisions etc.’<sup>103</sup>

Another judge took a similar position that:

‘The Act was already adopted from the EU. This is also true for some secondary legislation... The experience of the EU must be taken into account, but by considering the conditions that are peculiar to Turkey, past decisions of the TCA, judgments etc. the Turkish enforcement can be harmonised.’<sup>104</sup>

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<sup>101</sup> Anonymous interviewee(1), 09/04/2014, Ankara.

<sup>102</sup> Anonymous interviewee(2), 09/04/2014, Ankara.

<sup>103</sup> Anonymous interviewee(1), 09/04/2014, Ankara.

<sup>104</sup> Anonymous interviewee(2), 09/04/2014, Ankara.

#### 4.3.4. Observations of Academics

The last interviewee group comprises the academics who have their research interests in Art.6 or have published widely on competition law in Turkey. Similar to other interviewee groups, the academics were asked as to whether the current state of case law of the TCA and the Council of State on Art.6 was clear and consistent or in need of reform. It can be observed that some academics found the case law of the TCA consistent, while others disagreed with this proposition.

One academic expressed that:

‘Not so clear, not consistent either. Despite the two negative answers, there is, however, no need for a reform. The rule [the prohibition in Art.6] slightly enables to make consistent interpretations within the rule itself. So, the issue is to a large extent an issue of interpretation.’<sup>105</sup>

Another academic was more satisfied with decisions of the TCA and argued that:

‘The decisions of the TCA have become more consistent in recent years, because they [the TCA] have begun to use the same input to make the same analysis... The decisions of the TCA are not fully consistent, but nevertheless consistent enough to derive some conclusions.’<sup>106</sup>

Not all academics considered the state of the judgments of the Council of State in their replies, but those who did so stated that it was not consistent, but the real problem was the fact that the Council of State did not have enough expertise with Art.6.

One academic observed that:

‘I cannot say that the judgments of Danıştay are consistent, because Danıştay has not yet acquired the necessary expertise and has not yet gone beyond procedural issues towards substantial analyses...’<sup>107</sup>

Second, the academics were asked whether there was a need for Guidelines in relation to Art.6 or whether they felt the absence of such Guidelines based on their personal experience. Technically they answered this question in the affirmative, but it can be observed that they did not strongly advocate for the adoption of Guidelines in relation to Art.6 for different reasons.

One academic took the view that:

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<sup>105</sup> Anonymous interviewee(3), 25/04/2014, Ankara.

<sup>106</sup> Anonymous interviewee(2), 25/04/2014, Ankara.

<sup>107</sup> Anonymous interviewee(2), 25/04/2014, Ankara.

‘We can say that there is a need for Guidelines... It is not an essential need, but it is nevertheless useful to have a document in Turkish language, provided that the TCA will be able to abide by the Guidelines it has published.’<sup>108</sup>

Another academic expressed that:

‘There may be a need for Guidelines for the general public, rather than for the undertakings, because too many complaints are made to the TCA and most of them do not actually reflect the dominant position. These increase the workload of the TCA. In order for both complainants and undertakings that are not in a dominant position to better understand, there is a need for Guidelines. Guidelines are always beneficial. However, since there are already cases on what dominant undertakings can or cannot do, I do not think that Guidelines will change much for them. In many sectors, we are in a position to count the dominant undertakings in Turkey on the fingers of one hand... They should do the relevant self-assessment and should know.’<sup>109</sup>

Lastly, the academics were asked whether Turkey should adopt the Guidance or publish its own Guidelines in relation to Art.6. For this question, the replies were totally opposite in that some academics placed greater emphasis on Turkey’s own needs, while others opted for the adoption of the Guidance.

One academic highlighted the need for a more national version of Guidelines as follows:

‘When adopting statutes or regulation from other countries, this may make sense or may be appropriate. But Guidelines explain the details of an already established regulation. I prefer them to be more culture-specific, sector-specific and more national... Surely the main points [of the Guidance] can be taken into account, but by internalising the expertise from the national enforcement, I prefer “more Turkish” Guidelines.’<sup>110</sup>

Another academic took a negative stance against Turkey’s publication of its own Guidelines by claiming that:

‘Personally I do not think that there is a need for Guidelines which will be specific to Turkey. Eventually these are technical documents and largely based on economic theory. There is no difference between Turkey and the EU in terms of economic theory... It is for this reason that I earlier said the publication of Guidelines was not an essential need.’<sup>111</sup>

#### **4.3.5. Summary**

On the first question as to whether the current state of the case law of the TCA and the Council of State on Art.6 is clear and consistent or in need of reform, the overwhelming majority of the interviewees expressed that the decisions of the TCA were inconsistent; only one judge among all interviewees found the case law of the TCA consistent. One

<sup>108</sup> Anonymous interviewee(3), 25/04/2014, Ankara.

<sup>109</sup> Anonymous interviewee(2), 25/04/2014, Ankara.

<sup>110</sup> Anonymous interviewee(2), 25/04/2014, Ankara.

<sup>111</sup> Anonymous interviewee(3), 25/04/2014, Ankara.

competition expert and one academic noted that recent decisions of the TCA had become more consistent compared to earlier decisions. The interviewees tended to consider the clarity and consistency of the decisions together; only one competition expert gave separate answers to this question and found that the decisions of the TCA were clear.

With regard to the case law of the Council of State; with the exception of the judges, all of the interviewees who answered this question argued that the issue with the judgments of the Council of State was not the fact that they were inconsistent or unclear; the real problem was that they were far from providing any guidance on Art.6. The second part of the first question as to whether the case law was in need of reform was not answered by almost half of the interviewees. Majority of the interviewees who considered this part of the question expressed that there was a need for reform; only one high-ranked official within the TCA, one competition expert and one academic objected to a reform notwithstanding the state of the case law on Art.6.

On the second question as to whether there is a need for Guidelines in relation to Art.6 or whether the interviewees felt the absence of such Guidelines based on their personal experience, all members of the internal staff of the TCA and all lawyers replied that there was a need for Guidelines. Most members of the internal staff of the TCA and lawyers used words like “absolutely”, “definitely” or “of course” in this respect. The judges insisted that they did not feel the absence of Guidelines in relation to Art.6 and were rather reluctant to the issue of Guidelines in general. The academics agreed on the inconsistency of the case law, but expressed different views on the need for Guidelines.

In addition; “consistency”, “predictability” and “fulfilling the gap on Art.6 which was the only area left without any guidance” were the most cited reasons among the interviewees for the adoption of Guidelines in relation to Art.6. In sharp contrast to the Guidance, the reasons that paved the way for the issue of the Guidance, namely switching to an effects-based approach and consumer welfare-oriented approach, were not considered among the reasons for the adoption of Guidelines in relation to Art.6. Only two members of the commission that prepared the Guidelines on Art.6 pointed to a move towards an effects-based approach and a greater use of economic analysis in Art.6 cases as reasons for Guidelines in relation to Art.6.

On the third question as to whether Turkey should adopt the Guidance or publish its own Guidelines, the overwhelming majority of the interviewees expressed that Turkey should publish its own Guidelines in relation to Art.6, but should nevertheless benefit from the Guidance in this respect; only the academics gave little support for Guidelines that would be specific to Turkey. The interviewees tended to acknowledge the EU experience with Art.102 and took a reserved stance towards issuing fully independent Turkish Guidelines, while noting at the same time that Turkey's own needs should not be disregarded. However, not all interviewees mentioned what those needs were. Different elements were mentioned in this respect and the proposed content of Guidelines in relation to Art.6 differed among the interviewees.

Finally, on the first additional question as to whether Guidelines in relation to Art.6 should be in the form of "Guidelines" or "enforcement priorities", most of the interviewees who answered this question expressed that Guidelines in relation to Art.6 should be in the form of Guidelines in Turkey suggesting that the reasons in the EU for the preference of enforcement priorities did not exist in Turkey. Only one interviewee insisted that the TCA should set enforcement priorities just as the Guidance, not because of the formalistic judgments of appellate courts as in the EU, but because of the uncertainties with regard to the definition of abuse of a dominant position and the need for leaving more discretion to the TCA for this reason.

To conclude, it can be observed that the replies of the internal staff of the TCA and the lawyers to all of the three main interview questions were almost identical. In other words, the enforcers of Art.6 and the legal counsel of the addresses of Art.6 seemed to be "speaking the same language"; they shared similar opinions and beliefs with regard to the inconsistency of the case law and the need for Guidelines in relation to Art.6 which should take into Turkey's own needs while benefitting from the Guidance. The judges provided the most radical answers by finding the case law of the TCA and the Council of State consistent and seemed rather reluctant to the adoption of Guidelines in relation to Art.6. The academics, while agreeing on the inconsistency of the case law, sent mixed signals on the need for Guidelines in that they did not object to the issue of Guidelines, but did not advocate for such a need as strongly as the internal staff of the TCA and the lawyers.

## Conclusion

Chapter 4 aimed to determine whether there is a need for Guidelines in relation to Art.6 in Turkey and whether the Guidance can or should be used as a model for such Guidelines. To this end, the Chapter took both a theoretical and a practical approach: It both provided a discussion of the role of Guidelines as soft law instruments from a theoretical perspective and shed light on the opinions of different interviewee groups from a practical perspective. It discussed the functions of Guidelines in theory and analysed the benefits they offer, as well as the drawbacks they entail, to both competition authorities and courts as the enforcers of competition law rules and undertakings as the addressees of those rules in Section 4.1, examined the impact of Turkey's potential accession to the EU on the adoption of Guidelines in relation to Art.6 in Section 4.2 and lastly determined whether there is a need for Guidelines in relation to Art.6 in practice in Section 4.3. Section 4.1 observed that the TCA and other State authorities in Turkey have explicitly stressed the need for adopting Guidelines in relation to Art.6, which would theoretically provide transparency and predictability, increase legal certainty and minimise inconsistencies in the decisions of the TCA, while resulting in a voluntary restraint on the discretion of the TCA. Section 4.2 observed that mostly because of the *sui generis* nature of the Guidance as a soft law instrument, Turkey's duty of harmonisation under the Decision No 1/95 of the EC-Turkey Association Council does not *de jure* require the country to transpose the Guidance into Turkish competition law. Finally, Section 4.3 observed that while both the enforcers of Art.6 and the legal counsel of the undertakings as the addressees of Art.6 felt the need for Guidelines that would provide much-needed guidance in the enforcement of Art.6, the judges seemed rather reluctant to the adoption of Guidelines in relation to Art.6 and took the view that such Guidelines would have a limited impact on the judicial review of the Art.6 decisions of the TCA.

## **CHAPTER 5 – THE GUIDELINES ON ART.6 VIS-À-VIS THE NATIONAL EXPERIENCE OF TURKEY WITH ART.6**

### **Introduction**

Chapter 5 provides answers to the second main research question as to how Guidelines in relation to Art.6 can be best tailored to reflect Turkey's experience with Art.6. To this end, it addresses three sub-questions: First, what have the Guidelines on Art.6 brought to the enforcement of Art.6 and to what extent, are they in harmony with the established case law? Second, are there any historical and/or current issues on Art.6 that should have been addressed in the Guidelines on Art.6? Lastly, what will be the future of the Guidelines on Art.6? Having determined a need for Guidelines in Chapter 4, Chapter 5 furthers the discussion by examining how those Guidelines can be best tailored to reflect Turkey's experience with Art.6. To this end, it critically analyses the Guidelines on Art.6 in order to determine the extent to which they reflect the enforcement of Art.6 and discusses Turkey's own needs which are left outside the scope of these Guidelines. Similar to Chapter 4, Chapter 5 is also enhanced by the qualitative empirical data obtained from the research interviews.

Chapter 5 is divided into three sections: Section 5.1 provides a comparative analysis of the Guidelines on Art.6 with the Guidance and the established case law on Art.6. This Section examines the contributions of the Guidelines on Art.6, which are the same as those of the Guidance as a result of the transposition of the Guidance into Turkish competition law, in the light of the established case law on Art.6. In this respect, the role of the consumer welfare objective, effects-based assessments, anti-competitive foreclosure, the "as efficient competitor" test, efficiency defence and detailed assessments on specific forms of abusive exclusionary conduct in the enforcement of Art.6 are assessed. Section 5.1 observes that majority of these contributions in fact already existed in the decisional practice of the TCA especially in the aftermath of the Guidance, and while the general assessments of the Guidelines on Art.6 are to a great extent in line with the case law on Art.6, the specific assessments on specific forms of exclusionary conduct largely differ from those in the case law.



Section 5.2 addresses the historical and/or current issues in the enforcement of Art.6 in Turkey that were left outside the scope of the Guidelines on Art.6. As observed in Section 5.1, the substantive content of the Guidance is firmly followed in the Guidelines on Art.6 and the scope of the Guidelines on Art.6 thus mirrors the Guidance. This Section finds that the Guidelines on Art.6 included into its scope neither other types of abuses, such as exploitative abuses and discriminatory abuses; nor some other important elements, such as fines, private enforcement and the relation between competition law and sector-specific regulation, which are essentially left to the national laws of the MSs by the Guidance. In addition, as a result of the transposition of the Guidance into Turkish competition law, the Guidelines on Art.6 are silent on the most problematic areas in the enforcement of Art.6 in Turkey which are identified by both the author and different interviewee groups in Turkey. Section 5.2 observes that the absence of any guidance on the problematic areas that are peculiar to Turkish competition law undermines predictability and legal certainty as aimed by the Guidelines on Art.6 in the first place.

Section 5.3 speculates on the future of the Guidelines on Art.6. This Section explores whether the TCA will abide by its own Guidelines in its future decisional practice, what the reaction of the appellate courts to the Guidelines on Art.6 in their judgments will be and finally whether the adoption of such Guidelines will be in general beneficial for Turkey. It takes the view that the enforcement of the Guidelines on Art.6 is as important as their publication. Considering the EU experience with the post-Guidance period which was far more different than what was expected, the issue as to whether the TCA will abide by and whether the appellate courts will endorse or reject the Guidelines on Art.6 gains significance. Section 5.3 observes that based on some of its previous decisions that referred to the Guidance and even the draft Guidelines on Art.6, the TCA is expected to abide by its Guidelines on Art.6 in its future decisions, just as the appellate courts are expected to raise no objections so long as the TCA interprets these Guidelines in accordance with the statutory text of the Act.

## **5.1. Comparative Analysis of the Guidelines on Art.6 with the Established Case Law on Art.6 in the Light of the Contributions of the Guidance<sup>1</sup>**

### **5.1.1. The Guidelines on Art.6 at a Glance**

“Guidelines on the Assessment of Abusive Exclusionary Conduct by Dominant Undertakings” were published by the TCA on April 7, 2014.<sup>2</sup> As will be seen throughout this Section, the Guidelines on Art.6 are drafted very similar to the Guidance in terms of both structure and substantive content, with the main exception that they are substantive “Guidelines” and do not set any enforcement priority in contrast to the Guidance. They contain 94 paragraphs in five sections: “*1.Introduction*”, “*2.Dominant Position*”, “*3.Abus*”, “*4.Objective Justification*” and “*5.Specific Forms of Abuses*”. It can be seen that “*1.Introduction*” of the Guidelines on Art.6 corresponds to “*I.Introduction*” of the Guidance; “*2.Dominant Position*”, “*3.Abus*” and “*4.Objective Justification*” are together included in “*III.General Approach to Exclusionary Conduct*” in the Guidance; “*5.Specific Forms of Abuses*” corresponds to “*IV.Specific Forms of Abuses*”; and “*II.Purpose of This Document*” is not given a separate section in the Guidelines on Art.6. Like the Guidance, the Guidelines on Art.6 suddenly end after Section 5 with no more additional remarks.

Section 1 (paras.1-6) outlines the text of Art.6, the purpose and the scope of the document. Section 2 (paras.7-21) concerns with the definition of the relevant market and the determination of dominant position, and takes into account the same factors as the Guidance does: “market position of the dominant undertaking and its competitors”, “barriers to entry or expansion” and “countervailing buyer power”. Section 3 (paras.22-29) is on the abuse element and includes a definition of abuse of a dominant position, outlines the effects-based approach, articulates the concept of “anti-competitive foreclosure” and lastly adopts the “as efficient competitor” test as the governing test for price-based exclusionary conduct. Section 4 (paras.30-33) deals with objective justification which includes “objective necessity” and “efficiency”. Lastly, Section 5 includes detailed assessments on “refusal to deal” (paras.35-49), “predatory pricing” (paras.50-60),

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<sup>1</sup> This Section benefits from the following article that the author published elsewhere: Özkan, A. F. (2014a) ‘Hakim Durumun Kötüye Kullanılması Kılavuzu’nun Kapsamlı Bir İncelemesi’, *Rekabet Forumu*, No 85, p.10-42.

<sup>2</sup> See Annex II.

“price/margin squeeze” (paras.61-63), “exclusivity/single branding” (paras.64-68), “rebate systems” (paras.69-81) and “tying” (paras.82-94).

### **5.1.2. The Consumer Welfare Objective in the Enforcement of Art.6**

The move towards a more consumer-welfare oriented application of Art.102 is one of the fundamental premises of the modernisation of Art.102. The Guidance refers to consumers, interests of consumers and consumer detriment, but does not go far as the Discussion Paper which explicitly attributed the objective of protection of competition on the market as a means of enhancing consumer welfare to Art.102.<sup>3</sup> Similar to the Discussion Paper, the consumer welfare objective has been given a major role in the Guidelines on Art.6. This is evident from the definition of abuse of a dominant position which is set out in para.22 of the Guidelines on Art.6 as ‘the dominant undertakings engaging in conduct which is likely to directly or indirectly reduce consumer welfare by taking advantage of their market power’. Para.2 of the Guidelines on Art.6 similarly states that ‘the Act prohibits consumer welfare-reducing practices carried out by dominant undertakings by taking advantage of their market power’.

It can be seen that a strong emphasis is placed on the consumer welfare objective in Turkish competition law. The preamble of the Act makes references to “increased economic efficiency”, “*consumer and total welfare*”, “technological progress and innovation” and “the triumph of the successful, rather than the powerful” as the objectives to be pursued by the Act. In the “Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies” prepared by the ICN in 2007, respondents identified different objectives of unilateral conduct laws. Within this context, Turkey pointed to “ensuring an effective competitive process”, “*promoting consumer welfare*”, “maximising efficiency” and “ensuring a level playing field for small and medium size enterprises”.<sup>4</sup> Also in many domestic policy documents published by the TCA, the consumer welfare objective has been stressed. For

<sup>3</sup> See *supra* “1.3.3. Discussion Paper on the Application of Art.82 to Exclusionary Abuses”.

<sup>4</sup> ICN (2007) Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies, The Unilateral Conduct Working Group, 6th Annual Conference, Moscow, <<http://internationalcompetitionnetwork.org/uploads/library/doc353.pdf>> [accessed 30/09/2014].

example in “2013 Competition Letter”, the TCA made it clear that promoting consumer welfare is ‘*among the main objectives and goals of competition law*’.<sup>5</sup>

The trails of the consumer welfare objective can also be seen in many decisions of the TCA. In *Zincir Süpermarketler*, the TCA made it clear that ‘the objective of competition law is to maximise total welfare and economic efficiency, thereby making the market economy work effectively’ and maintained that at this point ‘there is a consensus among competition authorities in the world that *the decisive factor is consumer welfare*’.<sup>6</sup> In *UN RO-RO*, the TCA stated that ‘it is impossible for competition law to remain indifferent to dominant undertakings benefitting from their dominant position and maintaining/strengthening this position *in a way that decreases consumer welfare*’.<sup>7</sup> In *TÜPRAŞ*, it was stressed similarly to the abovementioned para.2 of the Guidelines on Art.6 that ‘the Act prohibits consumer welfare-reducing practices carried out by dominant undertakings by taking advantage of their market power’.<sup>8</sup> To conclude, the Guidelines on Art.6 are in conformity with the case law on the position of the consumer welfare objective.

### 5.1.3. The Role of Effects-based Assessments in Art.6 Cases

The Guidance is intended to contribute to the process of introducing a more economics-based approach in EU competition law enforcement and outlines an effects-based approach for the application of Art.102 to abusive exclusionary conduct. As a result of the adoption of the Guidance, the effects-based approach will also govern the application of Art.6. Para.24 of the Guidelines on Art.6 states that ‘in the assessment of exclusionary conduct, in addition to the specific factors of the conduct in question, its actual or likely effects will be considered’. In fact, the effects-based approach in the Guidelines on Art.6 is more advanced than the one set out in the Guidance in that para.22 of the Guidance, which allows the Commission not to carry out a detailed assessment of effects and infer anti-competitive

<sup>5</sup> Available in Turkish at <<http://www.rekabet.gov.tr/tr-TR/Sayfalar/2013-Yili-Rekabet-Mektubu>> [accessed 30/09/2014] (emphasis added).

<sup>6</sup> *Zincir Süpermarketler*, Decision no: 09-35/891-214, dated: 06/08/2009, p.7 (emphasis added). The TCA also stated in this decision that ‘the *ultimate objective of the Act is to increase consumer welfare*’. *ibid* at p.8 (emphasis added).

<sup>7</sup> *UN RO-RO*, Decision no: 12-47/1413-474, dated: 01/10/2012, p.34 (emphasis added).

<sup>8</sup> *TÜPRAŞ*, Decision no: 14-03/60-24, dated: 17/01/2014, p.32-33.

effects if the conduct creates no efficiencies and only raises obstacles to competition, does not exist in the Guidelines on Art.6.

It can be observed that the TCA has become more disposed to make economic analysis in Art.6 cases especially after the publication of the Guidance which gave a fresh impetus to the use of economic analysis in Turkey. In 2011, a new department within the TCA, namely the Economic Analysis and Research Department, was founded. It has been seen that in some decisions, some members of the Competition Board wrote a dissenting opinion in which they demanded more economic analysis from the rapporteurs of the case. For example in *Turkish Airlines/Pegasus*, one of the dissenting members of the Board expressed that the assessments and economic analyses based on the existing information and evidence in the file were insufficient.<sup>9</sup> Also high-ranked officials within the TCA confirmed that there has been an increase in the number of staff with a PhD in the economics of competition and that there has been a transition to econometric analysis from simple correlation or price and input analysis in the decisions of the TCA.<sup>10</sup>

In this respect, one competition expert expressed that:

‘It is hard to find the European judgments that have been criticised for their form-based approach in Turkey. In Turkey, maybe with a few exceptions, the effect on competition is discussed, the state of competitors as to whether they have been excluded, their markets shares have dropped, or prices have increased, is analysed and when appropriate, even the effect on consumer is discussed... In many cases, the effect on consumers, despite being not deep, is analysed... Therefore, I find the Turkish case law more advanced than the European case law.’<sup>11</sup>

As early as 2006, the TCA accepted in *Frito Lay* that dominant firms have a special responsibility unlike non-dominant firms, but nevertheless stressed that the ‘*correct assessment*’ was to analyse actual or potential effects of conduct on the competitive process in the market.<sup>12</sup> In *TTNET/Avea*, the TCA made it clear that for conduct to amount to an abuse, there must be ‘*anti-competitive effects which would harm consumer welfare*’.<sup>13</sup> In

<sup>9</sup> *Turkish Airlines/Pegasus*, Decision no: 11-65/1692-599, dated: 30/12/2011, p.23.

<sup>10</sup> Senyücel, O. (2012) “2011 Yılında Türk Rekabet Hukuku ve İktisadındaki Güncel Gelişmeler ve 2012’ye Bakış”, Rekabet Hukuku ve İktisadında Güncel Gelişmeler Sempozyumu X, The Turkish Competition Authority Publications, Ankara, p.122.

<sup>11</sup> Anonymous interviewee(2), 19/03/2014, Ankara.

<sup>12</sup> *Frito Lay*, Decision no: 06-24/304-71, dated: 06/04/2006, p.56-57 (emphasis added). The TCA also noted that the special responsibility of dominant firms does not translate into a per se ban on the dominant firm’s exclusive dealings (the conduct in the decision) even if the object is to restrict competition.

<sup>13</sup> *TTNET/Avea*, Decision no: 08-57/912-363, dated: 09/10/2008, p.5 (emphasis added).

*Turkcell GSM Kampanyaları*, the TCA expressed that ‘how the practices of [the dominant firm] affected the market was thoroughly examined’.<sup>14</sup> In *Turkcell Biz Bize Kamu*, the TCA reiterated that ‘in order to prove the existence of an exclusionary practice, *the effects that are generated by the conduct of the dominant firm in question must be assessed*’.<sup>15</sup> In *Doğan Yayın Holding*, ‘the rebate systems... have been subject to thorough and qualitative assessments in terms of both their exclusivity potential and effects.’<sup>16</sup> Consequently, although the TCA was already inclined to make economic analysis especially after the issue of the Guidance, it is expected that with the Guidelines on Art.6, the use of economic analysis in Art.6 cases will be institutionalised in Turkish competition law.

#### **5.1.4. Art.6 and Anti-competitive Foreclosure**

One of the contributions of the Guidance to the enforcement of Art.102 is the concept of anti-competitive foreclosure which describes the situation ‘where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.’<sup>17</sup> Para.25 of the Guidelines on Art.6 articulates that ‘the core of the assessment that the TCA will make in relation to exclusionary conduct is to analyse whether the conduct of the dominant undertaking leads to actual or potential anti-competitive foreclosure’ and defines this concept as ‘the impediment to or the prevention of access of actual or potential competitors to supplies or markets to the detriment of consumers as a result of the practices of the dominant undertaking’. Similar to the para.20 of the Guidance, para.26 of the Guidelines on Art.6 lists seven factors that are considered as generally relevant to the assessment of anti-competitive foreclosure:

- i. The position of the dominant undertaking,
- ii. The conditions on the relevant market,
- iii. The position of the dominant undertaking's competitors,

<sup>14</sup> *Turkcell GSM Kampanyaları*, Decision no: 09-60/1490-379, dated: 23/12/2009, p.60.

<sup>15</sup> *Turkcell BizBize Kamu*, Decision no: 10-21/271-100, dated: 04/03/2010, p.18 (emphasis added). In this decision, the TCA stressed that the special responsibility ‘should not be interpreted in a way that would lead to deprivation of the dominant firm’s opportunity to compete’. *ibid*.

<sup>16</sup> *Doğan Yayın Holding*, Decision no: 11-18/341-103, dated: 30/03/2011, p.110.

<sup>17</sup> Guidance, para.19.

- iv. The position of the customers or suppliers,
- v. The extent and duration of the allegedly abusive conduct,
- vi. Possible evidence of actual foreclosure, and
- vii. Direct and indirect evidence of any exclusionary strategy.

The concept of anti-competitive foreclosure was alien to Turkish competition law until its gradual appearance in recent decisions. Some past decisions referred to “*market foreclosure effects*” and define them as ‘the dominant undertaking preventing the entry of new firms into the market and thereby eliminating potential competition through its written or oral agreements with its customers’.<sup>18</sup> Similarly, in *Turkcell GSM Kampanyaları*, the TCA defined “*market foreclosure*” as ‘a strategic behaviour which prevents the entry of potential or actual competitors into upstream or downstream markets by one or more than one undertakings’.<sup>19</sup> The decisions which were issued in the aftermath of the Guidance tend to make references to this concept: In *Doğan Yayın Holding*, the TCA reached the conclusion that the conduct in question ‘was contrary to Art.6 of the Act due to its anti-competitive exclusion/foreclosure potential’.<sup>20</sup> In *UN RO-RO*, it was stressed that ‘it is essential to examine whether anti-competitive foreclosure is likely’ as a result of the conduct in question.<sup>21</sup>

As discussed above, in both anti-competitive foreclosure and “normal” or “lawful foreclosure”, actual or potential competitors of a dominant firm are excluded or eliminated from the relevant market; however, such exclusion or elimination harms consumers only in the context of anti-competitive foreclosure.<sup>22</sup> The prohibition of anti-competitive foreclosure will therefore result in the exoneration of normal foreclosure which is in line with the consumer welfare-oriented spirit of the Guidelines on Art.6. While recent decisions of the TCA tend to make references to the concept of anti-competitive foreclosure especially after the issue of the Guidance in the EU, this concept is officially brought to the fore in the assessment of abusive exclusionary conduct with the Guidelines on Art.6. With the adoption of the Guidelines on Art.6, the concept of anti-competitive foreclosure will

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<sup>18</sup> *Frito Lay*, p.45.

<sup>19</sup> *Turkcell GSM Kampanyaları*, p.19.

<sup>20</sup> *Doğan Yayın Holding*, p.92.

<sup>21</sup> *UN RO-RO*, p.37. See also *TTNET/Suponline*, Decision no: 13-71/992-423, dated: 19/12/2013, p.47.

<sup>22</sup> See *supra* “3.2.1. Anti-competitive Foreclosure”.

henceforth be the governing standard for intervention by the TCA in the enforcement of Art.6.

### 5.1.5. Art.6 and the “As Efficient Competitor” Test

According to para.23 of the Guidance, in order to prevent anti-competitive foreclosure, the Commission will normally intervene where the conduct in question is capable of hampering competition from competitors which are considered to be as efficient as the dominant firm. Similarly, para.27 of the Guidelines on Art.6 states that in determining anti-competitive foreclosure, the TCA ‘will examine whether it is likely for a hypothetical (as efficient) competitor who is equally efficient as the dominant undertaking to be excluded from the market as a result of the conduct in question’. Para.28 of the Guidelines on Art.6 makes it clear that if an equally efficient competitor can compete effectively with the price-based conduct of the dominant undertaking, the TCA ‘will infer that such conduct is not likely to have an adverse impact on effective competition, and thus on consumers, and will therefore be unlikely to intervene’.

In some of its past decisions, the TCA implicitly applied the “as efficient competitor” test without explicitly quoting the name of this test. As early as 2004, in *Coca Cola*, the TCA took the view that by pricing below its average total costs, a dominant undertaking may exclude ‘efficient competitors’ from the market.<sup>23</sup> In *TTNET Yaz Fırtınası*, the TCA applied the “as efficient competitor” test in the context of margin squeeze.<sup>24</sup> Similar to effects-based assessments, the “as efficient competitor” test has been more frequently applied in the recent decision of the TCA. In the decisions which were issued in the aftermath of the Guidance, the TCA applied the “as efficient competitor” test in the context of predatory pricing in *Kale Kilit* and explained that it adopted this test with a view to distinguishing ‘legal price competition from predatory pricing in a clear, understandable and foreseeable way’.<sup>25</sup>

The “as efficient competitor” test was therefore not alien to Turkish competition law before the Guidelines on Art.6 came out. In the view of this author, the reason why this test

<sup>23</sup> *Coca Cola*, Decision no: 04-07/75-18, dated: 23/01/2004, p.41.

<sup>24</sup> *TTNET Yaz Fırtınası*, Decision no: 08-65/1055-411, dated: 19/11/2008.

<sup>25</sup> *Kale Kilit*, Decision no: 12-62/1633-598, dated: 06/12/2012, p.6. See also *UN RO-RO*, p.35.



did not come into prominence in the context of predatory pricing in Turkey is because the TCA has mostly focused on the “intention” and “recoupment” elements rather than on the calculation of costs in predation cases and tended to close the case due to a lack of intention or possibility of recoupment in the absence of detailed assessments on costs.<sup>26</sup> In the context of margin squeeze, the role of this test is much more apparent and the TCA even made use of this test in the definition of margin squeeze as set out in *TTNET/Supersonic*.<sup>27</sup> All in all, it is expected that with the Guidelines on Art.6, the “as efficient competitor” test will be consistently applied to price-based exclusionary conduct if it is likely to exclude from the market an equally efficient competitor of a dominant undertaking.

#### **5.1.6. Art.6 and Efficiency Defence**

Neither Art.102, nor Art.6 envisages an exemption clause for the prohibition of abuse of a dominant position. In other words, there is no legal ground under any of these Articles for the undertaking to justify its conduct once it has been found contrary to Art.102 or Art.6. Notwithstanding, para.28 of the Guidance states that the Commission will take into account claims put forward by a dominant firm that its conduct is objectively justified and lists two ways as to how a dominant firm can avail itself of this objective justification: By either demonstrating that the conduct in question is “objectively necessary” or proving that the conduct produces substantial “efficiencies” outweighing its anti-competitive effects on consumers, commonly known as the “efficiency defence”. Likewise, a dominant firm may avail itself of these two types of justification, namely “objective necessity” under para.31 of the Guidelines on Art.6 or “efficiencies” under para.32 of the Guidelines on Art.6.<sup>28</sup>

In sharp contrast to the enforcement of Art.102, the concept of efficiency has been the foremost criterion in the assessment of abusive conduct in Turkish competition law. Even the preamble of Art.6 refers to ‘*internal dynamics*’ of dominant undertakings in

<sup>26</sup> See also *infra* “5.1.7.2. Predatory Pricing”.

<sup>27</sup> *TTNET/Supersonic*, p.7 (‘Margin squeeze is a vertically integrated dominant firm setting a margin between upstream input price and downstream product price in a way that makes it difficult for an equally efficient competitor in the downstream market to operate profitably.’)

<sup>28</sup> The four cumulative conditions for a successful efficiency defence under para.30 of the Guidance are identical to those set forth in para.32 of the Guidelines on Art.6 in that (i) the efficiencies have been, or are likely to be, realised as a result of the conduct, (ii) the conduct must be indispensable to the realisation of those efficiencies, (iii) the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets, and (iv) the conduct does not eliminate effective competition.

justifying their conduct.<sup>29</sup> The TCA has consistently made reference to this concept in its decisional practice and often used it interchangeably with efficiency as ‘*internal efficiency*’. As early as 2002, the TCA stated in *Karbogaz* that a dominant firm ‘successfully increasing its market shares *through its own internal efficiency*’ does not commit an abuse and maintained that ‘undertakings should be given the opportunity to make use of the benefits they derived from *their own internal efficiency and dynamics* in order to outdo their competitors’<sup>30</sup> In *Frito Lay*, the TCA explained that the desire of all undertakings is to be the best in the market, but it is prohibited for undertakings to achieve this end ‘by excluding their competitors *in ways that are different from efficiency*’.<sup>31</sup>

Indeed, efficiency has played a key role in many decisions of the TCA. In *Hilal Ekmek Fabrikası*, the TCA accepted that it is ‘natural for inefficient firms to exit the market as a result of fierce competition’ and reiterated that ‘the objective of competition law is to protect competition, not undertakings’.<sup>32</sup> Likewise, in *Tarsus Belediyesi*, the TCA confirmed that ‘inefficient undertakings have to withdraw from the market in free market economies’.<sup>33</sup> In *Neveksan Ekmek Fabrikası*, the TCA stressed that ‘it is the essence of competition that undertakings which fail to bring to the market high quality and more economic solutions in due course will be driven out of the market by competitive undertakings’.<sup>34</sup> What is important, as the TCA maintained, is ‘not the protection of small or large undertakings, but competition’.<sup>35</sup> In *Cevahir AVM*, the TCA decided that the exclusion of small undertakings in this case was not anti-competitive and was merely the result of them ‘not competing effectively due to their lack of a competitive power’.<sup>36</sup> Therefore, the TCA has not been “sentimental” to inefficient undertakings *vis-à-vis* efficient undertakings.

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<sup>29</sup> Pursuant to the preamble of Art.6: ‘For an undertaking to grow through its own internal dynamics and to obtain a dominant position in various sectors is not against competition law... On the other hand, dominant undertakings are prohibited to abuse their dominant positions in a way that has as its object or effect the prevention, restriction or distortion of competition within our country...’

<sup>30</sup> *Karbogaz*, Decision no: 02-49/634-257, dated: 23/08/2002, p.53 (emphasis added).

<sup>31</sup> *Frito Lay*, p.53-54 (emphasis added).

<sup>32</sup> *Hilal Ekmek Fabrikası*, Decision no: 09-48/1193-301, dated 21/10/2009, p.7.

<sup>33</sup> *Tarsus Belediyesi*, Decision no: 10-52/992-356, dated: 05/08/2010, p.7.

<sup>34</sup> *Neveksan Ekmek Fabrikası*, Decision no: 05-49/702-190, dated: 28/07/2005, p.2.

<sup>35</sup> *ibid.*

<sup>36</sup> *Cevahir AVM*, Decision no: 06-44/540-142, dated: 15/06/2006, p.4. See also *Aurubis Bulgaria/Dostel Alüminyum*, Decision no: 13-15/224-109, dated: 19/03/2013, p.9.

The TCA accepts the notion that the allegedly abusive conduct may generate efficiencies, which is one of the main premises of the modernisation of Art.102.<sup>37</sup> In *Sanofi Aventis*, the TCA noted that practices of a dominant firm may generate anti-competitive effects even in the absence of an intention to distort competition, but such practices may nevertheless yield some ‘benefits’.<sup>38</sup> In such cases, whether ‘efficiencies or ‘benefits’ outweigh adverse anti-competitive effects of the conduct on the market should be analysed.<sup>39</sup> As early as 2006, the TCA recognised the possibility of efficiency defence and held that ‘provided that the undertaking can offer an objective justification for its practices and/or justify its practices on the ground of its own internal dynamics, such situation should be deemed as normal and should not be held as an abuse’.<sup>40</sup> The decisions that were issued in the aftermath of the Guidance also confirm dominant undertakings’ efficiency defence under Art.6.<sup>41</sup> Consequently, efficiency defence has been well established in Turkish competition law even before the issue of the Guidance, and the Guidelines on Art.6 have only laid down more concrete (and also tougher) conditions for such defence.

#### **5.1.7. Specific Forms of Abusive Exclusionary Conduct in the Guidelines on Art.6**

As discussed above, Section 5 of the Guidelines on Art.6 contains some detailed assessments on specific forms of abusive exclusionary conduct. Similar to the Guidance, almost two thirds of the Guidelines on Art.6 (61 out of 94 paragraphs) is devoted to the analysis of specific forms of conduct, which include “refusal to deal” (paras.35-49), “predatory pricing” (paras.50-60), “price/margin squeeze” (paras.61-63), “exclusivity/single branding” (paras.64-68), “rebate systems” (paras.69-81) and “tying” (paras.82-94). Other types of exclusionary conduct, such as “selective pricing”<sup>42</sup> and “abuse of regulatory procedures”,<sup>43</sup> are thus left outside the scope of this Section. Para.34 of the Guidelines on Art.6 make it clear that the TCA will develop the analysis of the general

<sup>37</sup> Furthermore, in some cases, the TCA took into account “lack of efficiency” as one of the necessary conditions for the conduct in question to amount to an abuse under Art.6. In *TTNET/Avea*, the TCA decided *inter alia* that for tying to amount to an abuse under Art.6, there must not be any ‘objective justification and/or efficiency-enhancing practice’. *TTNET/Avea*, Decision no: 08-57/912-363, dated: 09/10/2008, p.5.

<sup>38</sup> *Sanofi Aventis*, Decision no: 09-16/374-88, dated: 20/04/2009, p.46.

<sup>39</sup> *ibid* at p.73.

<sup>40</sup> *Frito Lay*, p.54.

<sup>41</sup> *Turkcell GSM Kampanyaları*, p.19 and *UN RO-RO*, p.35.

<sup>42</sup> *Anadolu Cam/Marmara Cam*, Decision no: 09-35/877-206, dated: 06/08/2009 and *İZOCAM*, Decision no: 10-14/175-66, dated: 08/02/2010.

<sup>43</sup> *Turkish Airlines/Pegasus*.

factors mentioned in para.26, together with the more specific factors described in the context of these specific forms of conduct.

As will be seen, those specific forms of conduct largely correspond to those mentioned in the Guidance with a few differences in categorisation:

- “Rebate systems” and “exclusivity/single branding” are examined in two different subsections in the Guidelines on Art.6, whereas they are located together under the same subsection, “exclusive dealing”, in the Guidance.
- Contrary to the Guidance, “bundling” is separated from “tying” in the Guidelines on Art.6 and is placed under “rebate systems”.
- “Multi product rebates”, which is placed under “tying and bundling” in the Guidance, is treated in the same section with “rebate systems” in the Guidelines on Art.6.
- “Margin squeeze” is given an independent subsection in the Guidelines on Art.6 contrary to the Guidance which treats it alongside “refusal to deal”.

#### **5.1.7.1. Refusal to Deal**

Refusal to deal stands out as the most analysed type of abusive exclusionary conduct in the enforcement of Art.6 and it could be due to this reason that Section 5 starts with refusal to deal.<sup>44</sup> Para.35 of the Guidelines on Art.6 accepts the notion that ‘any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property’, but also adds that in some exceptional circumstances, ‘an obligation to supply may be imposed on the dominant undertaking’. According to para.38, refusal to supply includes goods, services, raw materials, access to a distribution system or a network, IPRs and any other assets that can be commercialised. Para.39 explains that refusing to supply a new customer or an existing customer makes no difference. Para.40 makes it clear that the subsection on refusal to deal only includes “unconditional” refusal to deal, while para.41 also includes “constructive refusal to deal” into the scope.

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<sup>44</sup> Notwithstanding, it is surprising to see that the subsection on refusal to deal cites only one decision of the TCA: *Cine 5/Digiturk*, Decision no: 12-24/710-198, dated: 03/05/2012.

In line with para.81 of the Guidance, para.43 of the Guidelines on Art.6 lists the same three cumulative conditions for refusal to deal to amount to an abuse under Art.6: (i) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market (paras.44-45), (ii) the refusal is likely to lead to elimination of effective competition on the downstream market (para.46), and (iii) the refusal is likely to lead to consumer harm (para.47). It can be observed that additional conditions were required in some past decisions of the TCA, while one or more than one of these three conditions was not deemed as necessary in other decisions as well. In *Roaming*, one of the conditions was expressed as ‘*lack of a sufficient capacity to satisfy demand*’,<sup>45</sup> while in *Bausch & Lomb*, the TCA listed ‘*the dominant undertaking refusing to supply some undertakings vis-à-vis others*’ as one of the necessary conditions in this respect.<sup>46</sup> On the other hand, *Anadolu Cam/Solmaz Mercan* did not require the “objective necessity” condition,<sup>47</sup> and *CNR/NTSR* required neither the “objective necessity” condition, nor the “elimination of effective competition” condition.<sup>48</sup> In none of its decisions did the TCA require consumer harm as a separate condition.

Despite being the most analysed type of exclusionary conduct, there are no general rules on refusal to deal in the decisions of the TCA as the analysis remained often case-by-case. It can be argued that with the adoption of the Guidelines on Art.6, the future decisions will be more consistent as the conditions in these Guidelines are expected to replace the abovementioned different conditions laid down in previous decisions. However, the conditions in the Guidelines on Art.6 for refusal to deal to amount to an abuse do not entirely reflect the existing case law on this area in Turkey. In this respect, the Guidelines on Art.6 make no reference to “essential facilities doctrine”, although the TCA issued many prohibition decisions based on this doctrine.<sup>49</sup> In addition to the abovementioned three conditions, the case law in this area often required the condition of “objective justification”, but the Guidelines on Art.6 already recognise such justification in para.48. As for the

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<sup>45</sup> *Roaming*, Decision no: 03-40/432-186, dated: 09/06/2003.

<sup>46</sup> *Bausch & Lomb*, Decision no: 07-30/302-115, dated: 05/04/2007 and *Nuh Çimento*, Decision no: 10-63/1317-494, dated: 07/10/2010.

<sup>47</sup> *Anadolu Cam/Solmaz Mercan*, Decision no: 09-39/949-236, dated: 26/08/2009.

<sup>48</sup> *CNR/NTSR*, Decision no: 07-74/896-333, dated: 19/09/2007.

<sup>49</sup> *Roaming*; *Türk Telekom/TİSSAD*, Decision no: 06-02/47-8, dated: 05/01/2006; and *ÇEAŞ*, Decision no: 07-13/101-30, dated: 08/02/2007.

condition of consumer harm, this is in fact consistent with the effects-based and consumer-welfare spirit of the Guidelines on Art.6, and therefore is hardly objectionable. In terms of harmonising the assessments of the Guidance with the existing decisions of the TCA on Art.6, the subsection on refusal to deal is generally good.

#### **5.1.7.2. Predatory Pricing**

The second specific type of conduct in the Guidelines on Art.6 is predatory pricing. Historically, one of the most discussed problems in competition law is perhaps the dividing line between predatory pricing and low pricing. In one of the decisions of the TCA on predatory pricing, the TCA highlighted that ‘one of the difficulties in this area is to distinguish anti-competitive predatory pricing from competitive low pricing’.<sup>50</sup> In its decisional practice, the TCA has generally been cautious not to chill pro-competitive low pricing which does not amount to predatory pricing.<sup>51</sup> The Guidelines on Art.6 define predatory pricing as ‘an anti-competitive pricing strategy whereby a dominant undertaking, with a view to maintaining or strengthening its market power, prices below its costs and sacrifices profits to exclude, discipline or otherwise hamper one or more of its actual or potential competitors’ (para.50). Para.51 states that the TCA will apply the “as efficient competitor” test as the legal test governing predatory pricing.

The Guidelines on Art.6 adopt new cost benchmarks in the assessment of predatory pricing and in this respect use average avoidable cost (AAC) and long-run average incremental cost (LRAIC). Similar to the Guidance, the Guidelines on Art.6 take the view pricing below AAC is an indication of sacrifice of profits on the part of a dominant undertaking and of foreclosure of market on the part of as efficient competitors (para.53). Pricing above LRAIC is an indication of the dominant undertaking’s pricing being not capable of foreclosing as efficient competitors from the market, and therefore does not give rise to an abuse (para.54). Unlike the clear “safe harbour” for pricing above LRAIC, the Guidelines on Art.6 state that in the event of pricing above AAC and below LRAIC, the

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<sup>50</sup> *Domino’s Pizza*, Decision no: 10-69/1458-557, dated: 04/11/2010, p.2.

<sup>51</sup> In *Selena Gida*, the TCA did not directly equate low pricing with predatory pricing and explained that low prices might be the fruit of ‘economies of scale’ or might be simply ‘introductory’. *Selena Gida*, Decision no: 05-63/902-244, dated: 29/09/2005, p.4. In *Akkaya Buz*, low pricing was found to be the ‘competitive reflex’ of the dominant firm in question. *Akkaya Buz*, Decision no: 10-52/993-357, dated: 05/08/2010, p.5.

TCA will investigate whether there is direct evidence showing a clear predatory strategy (para.55) or other factors pointing to the conclusion that the conduct is capable of foreclosing “as efficient competitors” from the market (para.56).

A careful analysis of the past decisions of the TCA shows that average variable cost (AVC) and average total cost (ATC) benchmarks were generally used in predation cases, while AAC and LRAIC benchmarks have begun to be used in some recent decisions, especially in the aftermath of the issue of the Guidance.<sup>52</sup> However, this transition seems imprecise that some other recent decisions also considered AVC and ATC.<sup>53</sup> Furthermore, the “intention” of dominant undertakings was often listed as one of the necessary conditions for predatory pricing in the case law. In addition, the recoupment element, which has been often considered in the past decisions of the TCA,<sup>54</sup> is no longer a necessary condition under the Guidelines on Art.6 (para.58). All in all, although the subsection on predatory pricing in the Guidelines on Art.6 is not fully in line with the previous decisions of the TCA, it can be argued that it follows the trend towards the use of AAC, LRAIC and the “as efficient competitor” test with the modernisation of Art.102. In this author’s view, the removal of the recoupment element from the necessary conditions is positive, due to problems with regard to its proof.

### 5.1.7.3. Margin Squeeze

The Guidelines on Art.6 define margin squeeze as ‘a vertically integrated dominant firm setting a margin between upstream input price and downstream product price in a way that makes it difficult for an equally efficient competitor in the downstream market to operate profitably’ (para.61). The biggest difference of the Guidelines on Art.6 from the Guidance is that the former treat margin squeeze as a stand-alone abuse, distinct from that of refusal to deal. The Guidance is based on the idea that if a dominant firm is entitled to refuse to deal with a competitor in the first place, it is also entitled to deal on conditions that make it

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<sup>52</sup> *UN RO-RO and Kale Kilit*.

<sup>53</sup> *Türkiye Şeker Fabrikaları*, Decision no: 13-46/589-259, dated: 18/07/2013.

<sup>54</sup> In some decisions, the dominant firm in question argued that recoupment must be a necessary condition for predatory pricing but the TCA rejected this argument (see *Coca Cola*). While in other decisions, the TCA decided to close the case due to a lack of possibility of recoupment (see *Toprak Mahsülleri Ofisi*, Decision no: 08-50/720-280, dated: 14/08/2008; *Türkiye Şeker Fabrikaları*). This is true for the intention element in that the dominant undertaking in question defended that intention was needed to establish an abuse in predatory pricing cases, but the TCA rejected this argument (see *UN RO-RO*).

impossible for competitors to compete.<sup>55</sup> However, this treatment of margin squeeze in the Guidance is explicitly rejected by the EU Courts in their judgments in the post-Guidance period.<sup>56</sup> The CJEU held that it was not necessary to establish that either the wholesale prices or retail prices were ‘in themselves abusive on account of their excessive or predatory nature’ and therefore margin squeeze was ‘capable, in itself, of constituting an abuse’.<sup>57</sup>

For margin squeeze to amount to an abuse under Art.6, four cumulative conditions have to be satisfied (para.62): (i) there must be a vertically integrated firm active in both an upstream market and a downstream market, (ii) this firm must supply an upstream input which is indispensable for its competitors to compete in the downstream market, (iii) this firm must hold a dominant position at least in the upstream market, and (iv) the margin between the wholesale prices charged in the upstream market and the retail prices charged in the downstream market must be so low that an equally efficient competitor cannot operate profitably in the downstream market. The TCA will take into account LRAIC of the vertically integrated dominant firm to determine the profitability of “as efficient competitors” in the downstream market (para.62) and consider the claims of objective justification (para.63).

Because the Guidelines on Art.6 adopt a different approach to margin squeeze, the conditions in the Guidelines on Art.6 for margin squeeze to amount to an abuse do not exist in the Guidance. It can be seen that in fact these four conditions do not significantly differ from those set out in the leading judgments on margin squeeze in EU competition law.<sup>58</sup> Perhaps, more could have been discussed in the Guidelines on Art.6. For instance, the Guidelines on Art.6 could have stated that the “reasonably efficient competitor” test, which analyses whether the margin is insufficient to allow a reasonably efficient competitor to obtain a normal profit based on the costs of such a competitor, might be used in some

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<sup>55</sup> See Guidance, para.80.

<sup>56</sup> See *supra* “3.3.2. The Judgments of the EU Courts in the Post-Guidance Period”.

<sup>57</sup> Case C-280/08 *Deutsche Telekom AG v Commission* [2010] ECR I-9555, para.183.

<sup>58</sup> See Case C-280/08 *Deutsche Telekom AG v Commission* [2010] ECR I-9555; Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-0527; and Case C-295/12 P *Telefónica SA and Telefónica de España SAU v European Commission* [2014] ECR I-0000.



cases.<sup>59</sup> More importantly, the Guidelines on Art.6 could have included some paragraphs on the intersection of competition law with sector specific regulation in analysing the allegations of margin squeeze under Art.6, considering the fact that the TCA has extensively dealt with the allegations of infringement of Art.6 in the telecom sector.<sup>60</sup> All in all, the subsection on margin squeeze stands out as one of the excellent parts of the Guidelines on Art.6.

#### 5.1.7.4. Exclusivity

The Guidelines on Art.6 define “exclusivity agreements” as ‘agreements whereby a customer is required to purchase all of or a significant portion of its demand for a specific product or a bundle of products from a single supplier’ (para.64). Contrary to EU competition law, the TCA has taken a negative stance towards a per se illegality rule for exclusivity in Turkish competition law.<sup>61</sup> The subsection on exclusivity in the Guidelines on Art.6 mirrors the effects-based approach adopted by the TCA towards exclusivity. The Guidelines on Art.6 take the view that exclusivity agreements may generate many pro-competitive effects, such as the prevention of the free rider problem, increase in the incentives of the supplier to engage in specific commercial investments and advertisements, ensuring a reliable supply/distribution channel to the benefit of both the supplier and the buyer, and providing more effective intra-brand competition (para.65). Even the subsection on exclusive dealing in the Guidance does not mention such benefits of exclusivity.

One of the few differences between the Guidelines on Art.6 and the Guidance relates to exclusivity in that the Guidelines on Art.6 examine exclusivity and rebates under two different subsections. As a result of this difference in categorisation, exclusivity and rebates are therefore subject to different analyses. As a general observation, rebates are subject to more economic analyses based on price and cost, while the assessment of exclusivity mostly involves behavioural and structural factors. Para.67 of the Guidelines on

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<sup>59</sup> The use of this test in some circumstances is endorsed by the CJEU in Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-0527, para.45.

<sup>60</sup> See *infra* “5.2.2. Exclusion of the Needs of Turkey from the Scope of Guidelines on Art.6”.

<sup>61</sup> *Türk Telekom/Grid Telekom*, Decision no: 09-47/1160-294, dated: 14/10/2009, p.7 (‘To claim that the dominant undertakings are not allowed in any way to make written or oral exclusive dealing arrangements with final points of sale, and to regard those exclusive dealing arrangements as per se abusive because of the fact that they are likely to lead to exclusion of competitors, will further restrict the way [dominant undertakings] do business which is already restricted as a result of their special responsibility.’).

Art.6 states that in assessing exclusivity agreements under Art.6, the TCA will consider (i) the scope of the exclusivity agreement (the share of the sales made under the exclusivity agreement versus the total sales in the relevant market), (ii) the level of the production chain (exclusivity at the retail level is considered more detrimental to competition compared to exclusivity at the wholesale level), (iii) barriers to entry, and (iv) the importance of the dominant undertaking for the customers (whether it is an unavoidable trading partner or not) and the duration of exclusivity.

In the assessment of exclusivity agreements, the existing case law has mostly focused on the duration of such agreements. The duration of exclusivity agreements seems to have had a direct bearing on the outcome of the decisions of the TCA.<sup>62</sup> The Guidelines on Art.6 contribute to the case law by adding additional factors to the assessment of exclusivity, some of which have been considered by the TCA, albeit not systematically. In addition, the Guidelines on Art.6 state that *de facto* exclusivity falls into the scope of the subsection on exclusivity as well. This internalises one of the features of the case law in Turkey, since in many cases the TCA encountered allegations of use of force, threat of force and assault on the part of the employees of dominant undertakings in order to ensure a *de facto* exclusivity.<sup>63</sup> To sum up, apart from a lack of clarification on cases where Art.6 and Art.4 of the Act jointly apply to exclusivity agreements,<sup>64</sup> the subsection of exclusivity is very good in terms of harmonising the assessments of the Guidance with the existing decisions of the TCA on Art.6.

#### 5.1.7.5. Rebates

The Guidelines on Art.6 define “rebate systems” as ‘price cuts offered to customers in exchange for their particular purchasing behaviour’ (para.69). The TCA takes the view that rebates are common practice and the structure, functioning and effects of rebates vary from rebate to rebate (para.69). Similar to exclusivity, the Guidelines on Art.6 accept that rebates may generate many pro-competitive effects, such decrease in price, increase in output,

<sup>62</sup> *Karbogaz and Fida Film Reklam*, Decision no: 09-29/632-148, dated: 18/06/2009.

<sup>63</sup> *Frito Lay; Microsoft/Gelecek Bilişim*, Decision no: 08-35/465-165, dated: 27/05/2008; *Turkcell/Avea/Vodafone*, Decision no: 11-34/742-230, dated: 06/06/2011; and *Mey İçki*, Decision no: 11-57/1476-532, dated: 17/11/2011.

<sup>64</sup> See *infra* “5.2.3. Problematic Areas in Practice: Observations of the Interviewees”.

reduction in transaction costs, prevention of the free ride problem and so on (para.72). A fundamental distinction is made between “single product rebates” (para.74-78) and “multi product rebates” (para.79-80) and although multi product rebates are examined under the subsection on “tying and bundling” in the Guidance as a form “mixed bundling”, the Guidelines on Art.6 analyse them under the subsection on rebates. In addition, rebates are further categorised into “retroactive rebates” versus “top slice rebates”, and “individualised threshold” versus “standardised threshold” (paras.70-71). Unlike the Guidance, the Guidelines on Art.6 do not adopt the terminology of “conditional rebates”.

The substantive analysis of single product rebates in the Guidelines on Art.6 does not depart from that of it in the Guidance: In determining whether a rebate system amounts to an abuse under Art.6, the TCA will take into account AAC and LRAIC of the dominant undertaking based on the “effective price” which will vary according to “contestable” and “non-contestable” portions of the demand of the customer. The TCA will examine whether “as efficient competitors” can compete effectively on equal footing for the contestable portion of the customer’s demand (para.76). The Guidelines on Art.6 establish a safe harbour for rebates if the effective price remains consistently above LRAIC of the dominant undertaking, as this would allow equally efficient competitors to compete profitably (paras.77). On the other hand, if the effective price is below AAC, then the rebate will be deemed as capable of foreclosing as efficient competitors (para.77). Finally, if the effective price is between AAC and LRAIC, the TCA will investigate whether entry or expansion of equally efficient competitors is likely to be affected (para.77).

In its past decisions on rebates, the TCA has mostly dealt with rebates in return for exclusivity and loyalty rebates, neither of which is specifically addressed in the Guidelines on Art.6. As a general observation, the TCA has adopted an effects-based approach to rebates, but it is hard to see detailed analyses on prices and costs in those decisions.<sup>65</sup> With the introduction of new concepts and new assessment techniques, the Guidelines on Art.6 significantly depart from the established case law on (single product) rebates. Although these detailed and fairly complicated price-cost analyses on rebates are in line with economics, they are very hard to implement in practice. A miscalculation of contestable

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<sup>65</sup> *Frito Lay*; *Amadeus*, Decision no: 08-01/6-5, dated: 03/01/2008; and *Doğan Yayın Holding*.

and non-contestable shares may result in significant errors in the assessment. Also the safe harbour for the effective price above LRAIC offers very little legal certainty, given the difficulties in the calculation of such price. Consequently, in the area of rebates, the Guidelines on Art.6 fail to attain its objective of providing legal certainty. The TCA may be required to enhance its capacity of economic analysis to implement the resource-intensive subsection on rebates.

#### **5.1.7.6. Tying**

The Guidelines on Art.6 define “tying” as ‘situations whereby a customer who buys a certain product (the tying product) from a dominant undertaking is also required to buy another product (the tied product) from that undertaking’ (para.82). Tying includes both “contractual tying” whereby two distinct products are tied through contractual arrangements and “technological tying” whereby two distinct are integrated to one another (para.82). The subsection on tying in the Guidelines on Art.6 mirrors the old theories based on market power and the leverage of market power from the tying market to the tied market, as well as the modern theories based on consumer harm and involving two distinct products in the absence of any coercion. Stressing that tying arrangements are common practice and do not restrict competition in most cases, the subsection on tying in the Guidelines on Art.6 points out that they may bring about better products and less costly options for consumers (para.83). The TCA has taken the view that tying arrangements are generally pro-competitive.<sup>66</sup>

For tying to amount to an abuse under Art.6, the Guidelines on Art.6 require two conditions to be satisfied (para.86): (i) the tying and tied products must be distinct products (para.86) and (ii) tying is likely to lead to anti-competitive foreclosure (paras.87-91 and 93). In some of its past decisions, the TCA required some additional conditions: In *TFF/Digiturk*, the TCA listed the necessary conditions for tying amount to an abuse as (i)

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<sup>66</sup> *Sigorta Acenteliği Yapan Bankalar*, Decision no: 09-34/786-191, dated: 05/08/2009, p.7 (‘The main reason why tying arrangements are prohibited in competition law is the risk of such arrangements harming consumer welfare. Many economic studies on this subject have shown that being common in practice, such arrangements have many pro-competitive effects and therefore they are generally pro-competitive; however, in some circumstances, tying arrangements may harm consumer welfare.’); *TÜVTÜRK*, Decision no: 09-58/1405-367, dated: 09/12/2009, p.13 (‘...[tying arrangements] do not always generate anti-competitive effects to the detriment of consumers from an economic point of view.’).

two distinct products, (ii) tying of those products, and (iii) the presence of a dominant position.<sup>67</sup> In *TÜVTÜRK*, the TCA found that (i) there must be two distinct products, (ii) the undertaking must hold a dominant position in the relevant market, and (iii) there must be a link between these two products.<sup>68</sup> In *TTNET/Avea*, the following conditions were required: (i) a dominant position, (ii) distinct/separate products, (iii) anti-competitive effects, and (iv) a lack of objective justification and/or efficiency-enhancing practice.<sup>69</sup> As can be seen, there is a lack of consistency in the case law with regard to the necessary conditions for tying to amount to an abuse under Art.6.

In the decisional practice of the TCA, the condition of two distinct products and tying of those products were required in every decision, while the condition of anti-competitive effects and objective justification were not discussed in some cases. In the view of this author, although the past decisions of the TCA point to different conditions, the two conditions envisaged in the Guidelines on Art.6 are generally sufficient. This is because the condition on the presence of dominant position is actually a pre-requisite for unilateral conduct to fall into the scope of Art.6 rather than a specific condition for tying, and the possibility of objective justification is already envisaged both as a general factor in the assessment of abusive exclusionary conduct (paras.30-33) and as a specific factor in the context of tying (para.94). That being said, the Guidelines on Art.6 could have discussed that tying may also amount to an exploitative abuse as the TCA accepted in some of its past decisions that tying may lead to “exploitation of consumers”.<sup>70</sup> All in all, the subsection on tying is very good in terms of harmonising the assessments of the Guidance with the existing decisions of the TCA on Art.6.

## **5.2. Historical and Current Issues in the Enforcement of Art.6**

### **5.2.1. The Scope and Limitations of the Guidelines on Art.6**

As shown above, the Guidance has been used as a benchmark in the preparation of the Guidelines on Art.6 which are drafted in a way that closely mirrors the paragraphs of the Guidance. Therefore, the content and contributions of the Guidance are injected into

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<sup>67</sup> *TFF/Digiturk*, Decision no: 06-61/822-237, dated: 07/09/2006, p.32.

<sup>68</sup> *TÜVTÜRK*, p.14.

<sup>69</sup> *TTNET/Avea*, p.5.

<sup>70</sup> *Garanti Bankası*, Decision no: 09-34/787-192 dated: 05/08/2009.

Turkish competition law. Another consequence of the adoption of the Guidance is that the subjects that are left outside the scope of the Guidance, such as different types of abuses, different forms of exclusionary conduct, different legal tests and so on, do not also fall into the scope of the Guidelines on Art.6 either. First and the foremost, the Guidance is only concerned with exclusionary abuses, and thus excludes exploitative and discriminatory abuses from its scope. Likewise, although the Guidelines on Art.6 recognise that abuse of a dominant position can occur in three different ways, namely exclusionary, exploitative and discriminatory abuses (para.5), it stresses that its scope ‘is limited to exclusionary conduct at this stage’ (para.6).

Allegations of exploitative abuses, in particular excessive pricing, are very common in the decisional practice of the TCA. One study observed that nearly one-fifth of the decisions of the TCA dealt with exploitative abuses.<sup>71</sup> In one of the seminal decisions on excessive pricing, *BELKO*, the TCA took the view that ‘the main objective of competition law is to protect the society from excessive prices’ and maintained that it would be against this objective to ‘tolerate’ excessive pricing.<sup>72</sup> Although this decision dates back to early years of competition law in Turkey, it is hard to argue that the TCA has been reluctant to use its enforcement powers against excessive pricing since then. Even a couple of months before the publication of the Guidelines on Art.6, the TCA issued a very controversial prohibition decision on excessive pricing, *TÜPRAŞ*.<sup>73</sup> Criticisms have been levelled against the very short duration of the infringement for being neither significant, nor persistent (2 months 20 days) and against the level of the price differential, as the basis for the excessive price, for being so low (15 percent).<sup>74</sup>

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<sup>71</sup> Sanlı, K. C. (2011) “*Rekabet Kurulu’nun Rekabetin Korunması Hakkında Kanun’un 6. Maddesine İlişkin Yaptırım Politikası Hakkında Değerlendirme*”, in Sanlı, K. C. (ed.), *Hâkim Durumun Kötüye Kullanılması*, XII Levha Publications, Istanbul, p.15-66. The study found that 46 out of 205 decisions between 1998 - 2009 dealt with allegations of exploitative conduct, regardless of whether the cases resulted in a finding of infringement.

<sup>72</sup> *BELKO*, Decision no: 01-17/150-39, dated: 06/04/2001, p.55.

<sup>73</sup> *TÜPRAŞ*, Decision no: 14-03/60-24, dated: 17/01/2014.

<sup>74</sup> Özkan, A. F. (2014b) The Turkish Competition Authority fines an ex-state-owned oil refinery for abusing its dominant position by charging excessive prices and imposing unfair trading conditions (TUPRAS), *e-Competitions Bulletin* June 2014-I, Article No 66728, <<http://www.concurrences.com/Bulletin/News-Issues/June-2014-I/The-Turkish-Competition-Authority-66728?lang=en>> [accessed 30/09/2014], p.3. Also, one member of the commission that prepared the Guidelines on Art.6 pointed out that ‘with respect to exploitative abuses, mainly excessive pricing, somehow there used to be a consistency, but after TÜPRAŞ we have to question that a little’. Anonymous interviewee, 04/03/2014, Ankara.

The Guidelines on Art.6 left unanswered many questions on excessive pricing such as what price will constitute an excessive price and what price will not, which test(s) will be used by the TCA, how the price-cost comparison will be made, how much profit margin is allowed in determining the difference between the costs actually incurred and the price charged, whether the alleged excessive price will be compared with the dominant firm's own prices in different geographic regions, at different points in time or with prices of competitors and so on. The draft Guidelines on Art.6 envisaged a limited intervention into excessive pricing, but the relevant section was removed from the final version.<sup>75</sup> In the area of exploitative abuses, the Guidelines on Art.6 thus fail to provide predictability and legal certainty for undertaking, just as they fail to meet the expectations of their legal counsel.<sup>76</sup> Consequently, especially after *TÜPRAŞ*, they are a missed opportunity to offer much-needed guidance on excessive pricing as one of the most common types of abusive conduct in the enforcement of Art.6.<sup>77</sup>

Discriminatory abuses are also left outside the scope of the Guidelines on Art.6. It can be argued that there is a need for guidance on discriminatory abuses in Turkish competition law as well. Discriminatory abuses generally cause “secondary line injury” at the level of customers with which the dominant undertaking does not compete, whereas exclusionary abuses cause “primary line injury” at the level of competitors. However, it is not clear from the case law on Art.6 as to whether discriminatory conduct can amount to an abuse in the absence of secondary line injury or exclusionary conduct with a discrimination element can cause secondary line injury. The TCA seems to be inconsistent in situations

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<sup>75</sup> The draft Guidelines on Art.6 envisaged that the TCA may take action if (i) the undertaking is a monopolist or a quasi-monopolist, (ii) the relevant market is not regulated, and (iii) the exploitative conduct harms consumer welfare. It was stressed that in cases where the relevant market is under the regulation and supervision of a sector-specific regulator, the TCA would instead give preference to competition advocacy.

<sup>76</sup> One lawyer observed that: ‘I think the real need is in the area of exploitative abuses, because exclusionary abuse is the easiest part of the story. We are able to teach it [to undertakings as their adviser]; undertakings can understand it... guidance on this area [exploitative abuses]... could have been useful’. Anonymous interviewee, 05/06/2014, Istanbul. Another lawyer expressed that: ‘The case law on Art.6 is not consistent... the TCA is taking a reserved approach... [An article in the Guidelines should state that] excessive pricing is limited to markets that are subject to regulation.’ Anonymous interviewee, 28/02/2014, Ankara.

<sup>77</sup> One high-ranked official within the TCA made it clear that: ‘The Guidelines [on Art.6] are not sufficient. The scope of the Guidelines is rather limited; they do not include excessive pricing. Excessive pricing is important in Turkey.’ Anonymous interviewee, 10/07/2014, Ankara.

where the dominant undertaking is not present in the downstream market.<sup>78</sup> In addition, there is a risk that the subparagraph (b) of Art.6 may wrongly apply to essentially pro-competitive conduct since it does not include the condition of “placing trading parties at a competitive disadvantage” unlike the subparagraph (c) of Art.102.<sup>79</sup> Also, whether the lack of such condition can be taken to mean that this subparagraph applies to discrimination among consumers is in need of clarification. Therefore, the Guidelines on Art.6 are also a missed opportunity to offer guidance on discriminatory abuses.

In this respect, another subject is collective dominance. Para.4 of the Guidelines on Art.6 states that although Art.6 prohibits any abuse by one or more undertakings of a dominant position acting individually or by means of agreements with others or collective practices, only single dominance is dealt with. Collective dominance, which emerged in the context of merger control, has dramatically lost its importance after the advent of the SIEC test. In this author’s view, exclusion of this concept from the scope of the Guidelines on Art.6 raises no problem. However, in Turkish competition law, collective dominance may give rise to a specific problem in that the statutory text of Art.6 refers to ‘*by means of agreements with others*’. Restrictive agreements are already prohibited under Art.4, and Art.6 apparently makes them illegal when they are engaged in by dominant undertakings. Notwithstanding, this uncertainty stems from the poor drafting of the Act and given the hierarchy of norms in the Turkish legal system, the Guidelines on Art.6 cannot legally provide a solution.

### **5.2.2. Exclusion of the Needs of Turkey from the Scope of Guidelines on Art.6**

The previous section discussed the subjects which were left outside the scope of the Guidelines on Art.6 as a result of the transposition of the Guidance into Turkish

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<sup>78</sup> In some decisions, the TCA decided that the dominant undertaking in question, which did not operate in the downstream market, infringed Art.6 by applying different trading conditions among its customers in that market. *Sanofi Aventis*. In other decisions, the TCA closed the case because of the fact that there was no vertical relationship between the dominant undertaking and its customers in the downstream market. *Gillette*, Decision no: 08-25/261-88, dated: 20/03/2008. See also *Cevahir AVM* and *Reckitt Benckiser/Akyüz Gıda*, Decision no: 10-63/1320-496, dated: 07/10/2010 for a finding that the dominant undertaking would have no incentive and motive to discriminate against its customers in the downstream market where it does not operate.

<sup>79</sup> However, in one of its decisions, the TCA rightly required that the discriminatory abuse must *inter alia* ‘place one of the customers at a competitive disadvantage against another’. *Coca Cola/TAB Gıda*, Decision no: 05-36/453-106, dated: 26/05/2005, p.21.



competition law, but which should have been nevertheless discussed in those Guidelines due to them being in need of guidance. In addition to those subjects, there are also other subjects which are not addressed in the Guidelines on Art.6 due to them being left to the national laws of MSs by the Guidance. For example, the Guidelines on Art.6 are silent on the sanctions to be imposed on dominant undertakings and/or on their executives.<sup>80</sup> Also the Guidelines on Art.6 do not mention the victim's right to compensation for breach of Art.6 who is entitled to seek treble damages under Arts.57-58 of the Act. The fact that the Guidelines on Art.6 do not show the consequences of infringement of Art.6 to dominant undertakings, as well as the legal rights and other entitlements to victims, significantly undermines their aim of 'providing guidance not only to undertakings in a dominant position on certain a market, but also to their competitors, customers or suppliers' (para.3).

Within this context, another issue is the intersection of competition law with sector-specific regulation, and the relations between the TCA and sectoral regulators in Art.6 cases.<sup>81</sup> In EU law, competition rules are laid down in the Treaty, but sector-specific regulation is mostly left to secondary legislation. However, competition law and sector-specific regulation are both legislation having the same legal force in Turkey, so competition law has no supremacy over sector-specific regulation and vice versa. Although the TCA has signed non-binding cooperation protocols with many sectoral regulators,<sup>82</sup> the "grey area" between competition law and sector-specific regulation in Art.6 cases still creates uncertainties; especially many controversial infringement decisions of the TCA concerns the telecom sector and significant fines were imposed on telecom companies.<sup>83</sup> The Guidelines on Art.6 are not sector-specific, but a brief discussion on how the TCA would assess the allegations of infringement of Art.6 in regulated markets *vis-à-vis* the

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<sup>80</sup> Pursuant to Art.16 of the Act, there is a fine up to 10 percent of total turnover in the preceding fiscal year for the undertaking infringing Art.6. In addition, the undertaking's executives and employees, who have played a significant role in the infringement, may be fined up to 5 percent of the fine imposed on the undertaking(s). The Act does not provide any criminal penalties.

<sup>81</sup> One academic argued that: 'The biggest problem [in the enforcement of Art.6] is regulated markets. The boundaries of [competition law] intervention into regulated markets have not been fully drawn.' Anonymous interviewee(2), 25/04/2014, Ankara.

<sup>82</sup> See Protocol between the Public Procurement Authority and the Competition Authority, dated: 14/10/2009; Protocol between the Information and Communication Technologies Authority and the Competition Authority, dated: 02/11/2011; and Protocol between the Banking Regulation and Supervision Authority and the Competition Authority, dated: 16/11/2012.

<sup>83</sup> See, for example, *Roaming*; *TTNET Yaz Fırtınası*; *Turkcell GSM Kampanyaları*; and *Turkcell/Avea/Vodafone*.

jurisdiction of sectoral regulators on the relevant issue could have contributed to the predictability and legal certainty for dominant undertakings in regulated markets.

In addition to the areas normally left to the MSs, the Guidelines on Art.6 do not fully address the needs of Turkey and exclude many problematic areas experienced in the enforcement of Art.6. In this respect, the reference to “aim” in the subparagraphs (a) and (d) of Art.6<sup>84</sup> have caused a great deal of controversy in the enforcement of this Article.<sup>85</sup> Based on the exact wording of these subparagraphs, the Council of State has favoured a literal interpretation technique and ignored the analysis of effects once an “aim” is proved. Some decisions of the TCA, which were closed due to a lack of effect, were actually annulled by the Council of State on the ground that the conduct in question literally fell into those subparagraphs despite them being merely illustrative.<sup>86</sup> The hierarchy of norms would probably tie the hands of the TCA and an amendment to the Act would eventually be needed, but the TCA could have at least explained in the Guidelines on Art.6 that the references to “aim” should not be taken to mean a per se illegality in the absence of an anti-competitive effect and that the evidence of “aim” can only be considered as generally relevant to the assessment of anti-competitive foreclosure under para.26 of the Guidelines on Art.6.

The subparagraph (a) of Art.6 also creates another problem in the enforcement of this Article: If interpreted literally, ‘practices which aim to impede the activities of competitors in the market’ comprise a very broad set of practices. Most practices unavoidably impede the activities of competitors, since it is inherent in the competitive process that competitors will be harmed from a dominant undertaking’s pro-competitive practices such as price cuts, introduction of new or improved products and so on. In some of its past decisions, the TCA rightly argued that this subparagraph should be interpreted narrowly and applied in rare cases where ‘the ability of a competitor to compete is

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<sup>84</sup> Both of those subparagraphs refer to “aim”, which can be translated into “object”, rather than “effects” of the conduct in question.

<sup>85</sup> Odman Boztosun argues that due to their drafting, the subparagraphs (a) and (d) make references to “aim” which is wrongly translated into conduct being found abusive by the Council of State in the absence of any effect. Odman Boztosun, A. (2011) “*Tek Yanlı Davranışlara Nasıl Yaklaşalım?*”, in Sanlı, K. C. (ed.), *Hakim Durumun Kötüye Kullanılması*, XII Levha Publications, Istanbul, p.110-114.

<sup>86</sup> See *infra* “5.3.2. What Will be the Reaction of the Appellate Courts?”.

significantly impeded or completely eliminated’.<sup>87</sup> In its decisional practice, the TCA seems to have distinguished ‘*impediments as can be normally expected from a competitive market*’ from ‘*impediments as a result of an anti-competitive practice of the dominant undertaking*’.<sup>88</sup> Although it may be hard to successfully draw a line between these two types of impediments, the need for a narrow interpretation as stressed by the TCA should have been mentioned in the Guidelines on Art.6 for the sake of clarity.<sup>89</sup>

### 5.2.3. Problematic Areas in Practice: Observations of the Interviewees

Based on the answers of the interviewees to the fourth interview question, Section 5.2.3 deals with the most problematic areas in the enforcement of Art.6 that should have been addressed in the Guidelines on Art.6. It should be noted that only the problematic areas which were not identified in previous sections are examined herein. In cases where the interviewees deemed as problematic one of the abovementioned issues, such as the exclusion of excessive pricing from the scope of Guidelines on Art.6 or the inconsistency in the case law on a specific type of abusive conduct, their observations are analysed in the relevant section.

To start with, the interviewees seemed to have acknowledged that problematic areas do exist in the enforcement of Art.6 implying that there is room for improvement.

One member of the commission that prepared the Guidelines on Art.6 expressed that:

‘Almost all areas [in the enforcement of Art.6] need clarification. We experience problems in every area.’<sup>90</sup>

Speaking in the context of Art.6, one high-ranked official within the TCA stated that:

‘This is a difficult area.’<sup>91</sup>

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<sup>87</sup> *Frito Lay*, p.55.

<sup>88</sup> *ibid*; *Akkaya Buz*, p.5.

<sup>89</sup> One competition expert expressed that: ‘You have to explain the undertakings where the boundaries of this criterion [impediment to competitors’ practices] begin and where they end. Actually they carry out many practices that impede the activities of competitors. However, you have to show them the instances which constitute an infringement of competition law. We cannot expect everyone to have a high level of awareness; certainty is needed.’ Anonymous interviewee, 22/03/2014, Ankara.

<sup>90</sup> Anonymous interviewee, 04/03/2014, Ankara.

<sup>91</sup> Anonymous interviewee, 24/02/2014, Ankara.

Perceiving the Article itself as the basis for the problems in its enforcement, another member of the commission that prepared the Guidelines on Art.6 claimed that:

‘In fact, Art.6 is in itself a problem’<sup>92</sup>

As a general observation, not all of the answers to the fourth interview question are helpful. This is because some interviewees preferred to answer this question very broadly, instead of pointing to specific problematic areas. For example, some interviewees took the view that definition of the relevant market, determination of a dominant position or the overall analysis of abuse were problematic in general and did not specify why this was so.

Suggesting an improvement in market definition, one lawyer said that:

‘The Guidelines on Art.6 could have reinforced the market definition... This is particularly important in abuse cases.’<sup>93</sup>

Expressing their dissatisfaction with the determination of dominant position in the decisions of the TCA, one high-ranked official observed that:

‘Dominant position is mostly about market power rather than market shares. I do not believe that the TCA makes adequate economic analysis on market power.’<sup>94</sup>

Likewise, one judge took the view that:

‘I find the enforcement [of Art.6 by the TCA] problematic in terms of the determination of dominant position and definition of the market. Guidelines involving specific and concrete criteria could have been adopted. Abuse is more clear I think.’<sup>95</sup>

As for the analysis of abuse, one high-ranked official noted that:

‘The determination of abuse is problematic. The standards, starting points, the necessary factors in the analysis are important etc. are important... There must be Guideline on exclusionary conduct.’<sup>96</sup>

Stressing the insufficiency of the case law, one academic claimed that:

‘I do not think that we have an established case law on many forms of abuses yet.’<sup>97</sup>

Apart from such general observations, specific points that were raised by the interviewees are outlined below:

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<sup>92</sup> Anonymous interviewee(2), 21/02/2014, Ankara.

<sup>93</sup> Anonymous interviewee, 05/06/2014, Istanbul.

<sup>94</sup> Anonymous interviewee, 27/02/2014, Ankara.

<sup>95</sup> Anonymous interviewee(1), 09/04/2014, Ankara.

<sup>96</sup> Anonymous interviewee, 20/06/2014, (email).

<sup>97</sup> Anonymous interviewee(3), 25/04/2014, Ankara.

One lawyer criticised the TCA for the use of intention as a substitute for effects in the enforcement of Art.6 as follows:

‘Although the effect principle [the effects-based approach] has been stressed in the Guidelines in both the EU and Turkey, the TCA places more emphasis on intention than on effects partly due to its laziness in terms of making economic analysis... Intention can only be an additional factor... If rivals are not excluded, the intention to foreclose should not make a difference. Unfortunately, this is not clear in the decisions of the TCA.’<sup>98</sup>

Addressing the same issue, one member of the commission that prepared the Guidelines on Art.6 expressed that:

‘Intention is considered in some cases. But we begin to support our cases with more objective arguments. In our draft Guidelines, intention can only be an additional factor once the infringement is established. The introduction of more objective factors by the draft Guidelines is welcomed.’<sup>99</sup>

One academic shed light on the relationship between Art.6 and Art.4 and drew attention to the potentially “opportunistic” use of Art.4 *vis-à-vis* Art.6:

‘Sometimes the TCA relies on Art.4 [of the Act] to fine dominant undertakings... In order not to determine a dominant position, it prefers to go for Art.4... The per se rule under Art.4 is easier. In order to strengthen its hand, it relies on Art.4. This will lead to fewer Art.6 cases in the long-run.’<sup>100</sup>

Pointing to the same problem, one lawyer similarly observed that:

‘Our Communiqué on vertical agreements block exempt exclusivity agreements, if the market shares of the parties do not exceed 40 percent... But it is not clear whether conduct [exclusivity agreements] which forecloses competitors should be examined under Art.4 or Art.6... Here the fundamental problem is that while the object restriction is sufficient in the absence of effect under Art.4, the effect principle applies under Art.6. Different consequences may arise as a result of subjecting the same conduct to different rules.’<sup>101</sup>

Identifying a problematic area in the determination of pricing abuses, one high-ranked official within the TCA expressed that:

‘Statistics is very weak in Turkey. We face difficulties in calculating the costs of undertakings, for instance how much sale is made, how much imports and exports are made etc. Most of the time we have to rely on the information provided by the undertakings.’<sup>102</sup>

Likewise, one competition expert also complained that:

‘The calculation of cost is difficult... In many sectors, the issue of cost is problematic... Cost benchmarks are too hypothetical. They originate from the application of economic theory to practice... The

<sup>98</sup> Anonymous interviewee, 28/02/2014, Ankara.

<sup>99</sup> Anonymous interviewee(2), 21/02/2014, Ankara.

<sup>100</sup> Anonymous interviewee(2), 25/04/2014, Ankara.

<sup>101</sup> Anonymous interviewee, 28/02/2014, Ankara.

<sup>102</sup> Anonymous interviewee, 26/03/2014, Ankara.

issue of cost is a problem which cannot be overcome with the help of Guidelines. It will always be a problem that we face.<sup>103</sup>

Expressing their dissatisfaction with the treatment of the efficiency defence by the TCA, one judge said that:

‘There may be issues related to the efficiency defence. I do not think that the TCA has any standard in this respect.’<sup>104</sup>

Commenting on the burden of proof in objective justification, one competition expert argued that:

‘The burden of proof in terms of objective justification is on the dominant undertaking, but undertakings may not have the necessary expertise to prove this... When we look at the example of Turkey, we have to deal with small- and medium-sized undertakings most of the time. Placing such burden on these undertakings may not serve the purpose [of objective justification].’<sup>105</sup>

Lastly, one competition expert stated that:

‘I think the number of safe harbours must be increased. For example in US antitrust law, above cost pricing is not regarded as an abuse from the outset... This should be the case with Turkey as well.’<sup>106</sup>

To sum up, it appears from the observations of the interviewees that problematic areas do exist in the enforcement of Art.6. In other words, the enforcement of Art.6 does not please all of the interviewees. Not all interviewees pointed to specific areas that they deemed as problematic, but those who did so listed some problematic areas which were very different from each other. While the Guidelines on Art.6 addressed some of those problematic areas such as the role of intention in Art.6 cases (para.26), they are silent on many other problematic areas such as the relationship between Art.6 and Art.4, cost calculation and selective above cost pricing. Therefore, the Guidelines on Art.6 do not meet all expectations of the internal staff of the TCA, lawyers, judges and academics in Turkey.

### **5.3. The Future of the Guidelines on Art.6**

#### **5.3.1. Will the TCA Abide by Its Own Guidelines?**

One of the most questioned issues in EU competition law was how the enforcement of Art.102 would be shaped in the aftermath of the Guidance. There were doubts as to whether

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<sup>103</sup> Anonymous interviewee(1), 25/04/2014, Ankara.

<sup>104</sup> Anonymous interviewee(2), 09/04/2014, Ankara.

<sup>105</sup> Anonymous interviewee, 03/04/2014, Ankara.

<sup>106</sup> Anonymous interviewee(2), 19/03/2014, Ankara.

the Commission would abide by its own Guidance, given the practical difficulties in applying the new effects-based approach and the “opportunity” to win the case on basis of the formalistic case law.<sup>107</sup> Arguably, the same situation will not be the case with Turkey in that the new reading of Art.102 with the Guidance is generally not alien to Turkish competition law. As discussed above, the TCA was already inclined to make economic analysis and effects-based assessments even before the issue of the Guidelines on Art.6.<sup>108</sup> With the exception of some new conditions for specific forms of exclusionary conduct, the Guidelines on Art.6 do not radically differ from the case law on Art.6. Nevertheless, if the principles set out in the Guidelines on Art.6 are not enforced, there is a risk of legal uncertainty for dominant undertakings. Besides, since the Guidelines on Art.6 aim to provide consistency in the case law, they will be a missed opportunity unless they are complied with in practice.<sup>109</sup>

As one member of the commission that prepared the Guidelines on Art.6 observed:

‘Providing consistency in case law will be the biggest contribution to us.’<sup>110</sup>

There are many signs that show the willingness of the TCA to apply and abide by the Guidelines on Art.6. First, in many of its decisions prior to the publication of the Guidelines on Art.6, the TCA directly referred to the Guidance and decided the case in question accordingly.<sup>111</sup> Furthermore, the Guidelines on Art.6 reflect the EU experience with Art.102, and again in many of its decisions, the TCA quoted and discussed the literature on EU competition law.<sup>112</sup> Most importantly, in a decision that was issued only weeks before the publication of the Guidelines on Art.6, the TCA referred to the draft Guidelines on Art.6 when listing the necessary conditions for tying to amount to an abuse.<sup>113</sup> The fact that the TCA was inclined to make reference to the draft Guidelines even before the final version was published implies that it will *a fortiori* rely on the Guidelines on Art.6 in its future decisions. It is reasonable to argue that the TCA will be willing to

<sup>107</sup> See *supra* “3.3.1. Initial Expectations from the Post-Guidance Period”.

<sup>108</sup> See *supra* “5.1.3. The Role of Effects-based Assessments in Art.6 Cases”.

<sup>109</sup> It is evident from the drafting of the Guidelines on Art.6 that such consistency will be in the form of reorientation of the enforcement of Art.6 fully in line with these Guidelines rather than in the form of unification of the existing case law on Art.6.

<sup>110</sup> Anonymous interviewee(1), 21/02/2014, Ankara.

<sup>111</sup> *Turkcell BizBize Kamu*; *Doğan Holding*; *Turkcell/Avea/Vodafone*; and *Cine5/Digiturk*.

<sup>112</sup> *İZOCAM*; *Turkcell BizBize Kamu*; *Turkcell GSM Kampanyaları*; and *Anadolu Cam/Marmara Cam*.

<sup>113</sup> *Coca Cola Damla Su*, Decision no: 14-08/159-69, dated: 26/02/2014.

apply and abide by the Guidelines on Art.6 in its future decisions. As there is no formal commitment procedure in the Act, future decisions of the TCA will not mainly be commitment decisions in contrast to the post-Guidance period in the EU.

### 5.3.2. What Will be the Reaction of the Appellate Courts?

After the amendment made to the Act in July 2012, the court of first instances for the decisions of the TCA is changed from the Council of State to the Ankara Administrative Court, whose judgments are further appealable to the Council of State. Since the amendment is very recent, there is not an adequate body of judgments on Art.6 to determine the potential reaction of the Ankara Administrative Court to the Guidelines on Art.6. Nevertheless, one judgment of the Court deserves mention in this respect: Pursuant to para.7 of the Guidelines on Art.6, the TCA is entitled to close the case if there is no dominant position and/or abuse, and therefore may start its analysis with either of them. In *Turkish Airlines/Pegasus*, which was handed down in July 2013 when the draft Guidelines were released for public consultation, one of the grounds for annulment was the fact that the TCA held that there was no abuse without *a priori* determining that the undertaking in question held a dominant position.<sup>114</sup> Thus, the Court clearly took a negative stance against the discretion of the TCA to start with the analysis of either dominant position or abuse, which was actually exercised in numerous decisions of the TCA.<sup>115</sup> The Court's objection to this relatively straightforward method of analysis suggests that the Court may *a fortiori* issue judgments contrary to other assessments of the Guidelines on Art.6.

One member of the commission that prepared the Guidelines on Art.6 argued logically that:

‘We find no infringement where there is a lack of dominant position or abuse. This forms our usual practice and is vastly endorsed in the judgments of Danıştay. But the [Ankara Administrative] Court

<sup>114</sup> Ankara Administrative Court, 11<sup>th</sup> Chamber, Decision no: E.2012/1727, K.2013/1083, dated:11/07/2013.

<sup>115</sup> See Özkan, A. F. (2013) The Ankara Administrative Court annuls the decision of the TCA which rejected the alleged predatory pricing and abuse of regulatory procedures of the national flag carrier airline of Turkey (Turkish Airlines/Pegasus), *e-Competitions Bulletin* November 2013-I, Article No 59426, <<http://www.concurrences.com/Bulletin/News-Issues/November-2013/The-Ankara-Administrative-Court?onglet=1&lang=en>> [accessed 30/09/2014], p.3 (‘[T]he Court’s stance on the determination of dominant position as the foremost stage of the assessment runs counter to both procedural economy and the usual administrative practice of the TCA, and seems not very practical either...’) (citations omitted).



reversed this... If we are facing problems even in such a fundamental area, we may experience difficulties in more fundamental areas on appeal. I hope this will not happen...'<sup>116</sup>

Compared to the Ankara Administrative Court, the Council of State has handed down many judgments on Art.6 which may have some implications for the future of the Guidelines on Art.6. Still, the judgments of the Council of State have remained largely unsatisfactory in many respects. Demiröz and Tunçel observe that with some exceptions, the judgments of the Council of State on Art.6 tend to be very short, often repeat the text of Art.6 and the operative part of the decisions of the TCA and add a paragraph or two thereon, do not cite the previous judgments on similar matters and finally do not refer to cases from EU competition law or discussions in the EU literature.<sup>117</sup> The authors find that they lack an analytical framework, are often confined to specific facts of the case at hand and almost refrain from challenging the substantive tests applied by the TCA on its own initiative.<sup>118</sup> Furthermore, key concepts such as consumer welfare, foreclosure and so on were not, as the authors observe, adequately discussed in the judgments. For all these reasons, the authors reach the conclusion that the judgments of the Council of State on Art.6 were far from providing adequate guidance.

Evident from its judgments, the Council of State neither objects to the consumer welfare objective, nor places the Ordoliberal philosophy at the forefront or justifies the protection of competitors in Turkish competition law. Instead the real problem is that the Council of State has favoured a literal interpretation of the Act in its judicial review and in this respect, placed greater emphasis on the statutory text of Art.6. Although both the text and the preamble of Art.6 make it clear that the subparagraphs of Art.6 are illustrative and non-exhaustive, the Council of State has treated them as almost per se infringements of Art.6: When the conduct in question literally falls into one of the subparagraphs of Art.6 and the TCA decides that there is no abuse, in particular when the conduct does not generate anti-competitive effects; the Council of State tends to annul the decision of the

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<sup>116</sup> Anonymous interviewee(2), 21/02/2014, Ankara.

<sup>117</sup> Demiröz, A. and Tunçel, Ç. (2011) *Tek Taraflı Davranışların Değerlendirilmesine Yönelik Standart Arayışında Danıştay Kararlarının Yol Göstericiliği, Rekabet Hukuku ile İlgili Kurul ve Yargı Kararları Sempozyumu-II*, BTHAE Publications, Ankara, p.158-160.

<sup>118</sup> Indeed the Council of State does not often question the fact that the practices identified by the TCA can amount to an abuse under Art.6, but considers the particular circumstances around the decision to challenge the legal characterisation of the facts by the TCA.

TCA.<sup>119</sup> The practical consequence of such a method of interpretation is that it disregards the effects of the conduct on competition or on consumers and ultimately makes the Council of State less supportive of an effects-based approach to Art.6. Should the Council of State continue strictly adhering to the subparagraphs of Art.6, the future of the effects-based assessments may be at risk in Turkey. The statutory text of Art.6 may therefore limit the scope for the enforcement of the Guidelines on Art.6.

Practical views from practice also deserve mention in this respect. The interviewees were asked the fifth interview question as to whether they expected any opposition from the appellate courts to the implementation of the Guidelines on Art.6 in Turkey. Based on their replies, it can be observed that majority of the interviewees did not expect any opposition from the appellate courts to the Guidelines on Art.6 based on their experience with previous Guidelines issued by the TCA. The high-ranked officials within the TCA, the competition experts, the lawyers and the academics did not expect an opposition, whereas the members of the commission that prepared the Guidelines on Art.6 were more sceptical in this respect, mostly due to the literal interpretation of the subparagraphs of Art.6 by the Council of State. The judges chose not to answer this question due to their concern about bias of judge.

One high-ranked official within the TCA observed that:

‘So far we have issued many similar Guidelines... We have not experienced any problem like that yet... I do not think that we will face a problem unless of course it [the Guidelines on Art.6] is not contrary to the Act... Danıştay mostly relies on the Act and by-laws if there are any.’<sup>120</sup>

One competition expert explained that:

‘Based on the cases I worked on as a rapporteur, Danıştay attaches importance to what we have written in Guidelines, treats them like a piece of legislation and does not see any problem in applying a rule in Guidelines to the case at hand... The TCA has used its discretion by issuing Guidelines. There is no problem with that.’<sup>121</sup>

Another competition expert expressed that:

‘Unless the Guidelines include an area to which the appellate courts have objected before, I do not think that there will be any problem.’<sup>122</sup>

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<sup>119</sup> See the Council of State, 13<sup>th</sup> Chamber, Decision no: E.2006/2308, K.2008/3417, dated: 31/03/2008; Decision no: E.2007/13574, K.2011/486, dated: 07/02/2011; and Decision no: E.2008/8249, K.2011/1525, dated: 12/04/2011.

<sup>120</sup> Anonymous interviewee, 24/02/2014, Ankara.

<sup>121</sup> Anonymous interviewee(1), 19/03/2014, Ankara.

<sup>122</sup> Anonymous interviewee, 14/03/2014, Ankara.

One other competition expert stated that:

‘Since it [the Guidelines on Art.6] does not envisage a radical change, I do not expect any objection from the appellate courts...’<sup>123</sup>

One lawyer took the view that:

‘I do not expect [any opposition]... because the TCA has not experienced a real problem in terms of judicial review even in areas which do not provide a fertile ground for Guidelines... The biggest challenge was the Fining Guidelines [2009], but it [the TCA] has passed that test.’<sup>124</sup>

One academic noted that:

‘In my experience, I have not seen any particular objection to Guidelines from the judiciary because the courts are not bound by them. Guidelines only deal with likely actions which are subject to change based on the specific facts of the case at hand. I do not expect any objection.’<sup>125</sup>

On the other hand, one member of the commission that prepared the Guidelines on Art.6 expressed that:

‘The subparagraphs (a) and (d) of Art.6 speak of “aim”... To what extent these two subparagraphs and the preamble [of Art.6] allow an effects-based approach is disputable. There is a possibility that the courts may annul the effects-based decisions... We will see.’<sup>126</sup>

Another member of that commission claimed that:

‘The Guidelines [on Art.6] adopt an effects-based approach. It can be argued that this may conflict with the wording of our Art.6, since two of its subparagraphs explicitly refer to “aim”. Maybe at this point there can be a problem... However, problems can only arise in the short-run. In the long-run everything will be fine and undertakings will be provided a much more predictable state.’<sup>127</sup>

Consequently, apart from the problem caused as a result of the literal interpretation of the statutory text, in particular the subparagraphs, of Art.6; the Council of State is not expected to raise objections to the Guidelines on Art.6. In contrast to the heated debates in the EU, whether the Turkish Appellate Courts would endorse the Guidelines on Art.6 will hardly be a topic for discussion in Turkey. In this respect, the contrast between the two jurisdictions could not be starker.

### **5.3.3. Will the Guidelines on Art.6 Be in General Beneficial for Turkey?**

With the publication of the Guidelines on Art.6, it is expected that decisions of the TCA will be more consistent with each other, the decision making will be more transparent and

<sup>123</sup> Anonymous interviewee, 03/04/2014, Ankara.

<sup>124</sup> Anonymous interviewee, 05/06/2014, Istanbul.

<sup>125</sup> Anonymous interviewee(2), 25/04/2014, Ankara.

<sup>126</sup> Anonymous interviewee(1), 21/02/2014, Ankara.

<sup>127</sup> Anonymous interviewee, 04/03/2014, Ankara.

swift since rapporteurs within the TCA will be able to rely on one single document instead of having had to examine the entire case law, the use of effects-based assessments and economic analysis will be institutionalised in Turkey and a high level of convergence between EU and Turkish competition laws will be achieved. The decisions of the TCA will increasingly reflect the contributions of the Guidelines on Art.6. In this respect, the consumer welfare objective will be reiterated, the number of effects-based decisions will increase, more emphasis will be placed on the use of economic analysis, the “as efficient competitor” test will be more widely used in the context of price-based exclusionary conduct, the concept of anti-competitive foreclosure will be the governing standard for intervention into exclusionary conduct, the efficiency defence will be widely cited by dominant undertakings and finally decisions on specific types of abusive exclusionary conduct will be more in line with the assessments and tests envisaged for each specific type of conduct in the Guidelines on Art.6. Ultimately, effects of the Guidelines on Art.6 are expected to be more widely felt in the decisional practice of the TCA.

The interviewees were asked the sixth interview question as to whether it would be beneficial in general for Turkey to adopt Guidelines in relation to Art.6. Based on their replies, not even a single member of the internal staff of the TCA, lawyer or academic answered in the negative. Most members of the internal staff of the TCA even replied with the words “absolutely”<sup>128</sup> or “of course”.<sup>129</sup> However, the judges took the view that such Guidelines could only be indirectly beneficial at best, implying that they would rather play a marginal role in the judicial review.

One member of the commission that prepared the Guidelines on Art.6 expressed that:

‘Absolutely beneficial. Beneficial and much-needed. Even belated.’<sup>130</sup>

One academic stated that:

‘It is hard to say that the Guidelines will not be beneficial.’<sup>131</sup>

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<sup>128</sup> Anonymous interviewee, 20/02/2014, Ankara; anonymous interviewee(2), 21/02/2014, Ankara; anonymous interviewee, 14/03/2014, Ankara; anonymous interviewee(1), 19/03/2014, Ankara; anonymous interviewee(2), 19/03/2014, Ankara.

<sup>129</sup> Anonymous interviewee(1), 21/02/2014, Ankara; anonymous interviewee, 27/02/2014, Ankara.

<sup>130</sup> Anonymous interviewee(2), 21/02/2014, Ankara.

<sup>131</sup> Anonymous interviewee(3), 25/04/2014, Ankara.

One lawyer drew attention to the risk that:

‘In general beneficial... Over time these Guidelines may no longer serve the purpose they intended. If necessary amendments are not made, they may lead to Type-1 and Type-2 errors... They must be kept up-to-date... But this would generate a risk for predictability: The more you update, the less predictable they will become.’<sup>132</sup>

All in all, being the first piece of secondary legislation on Art.6 and having a vast support from the internal staff of the TCA, the lawyers and the academics in Turkey who were interviewed for the purposes of this thesis, the Guidelines on Art.6 will contribute to the establishment of a coherent policy on abuse of a dominant position in Turkey, despite the fact that they could have resolved many problematic areas in the enforcement of Art.6.

## Conclusion

Chapter 5 examined how Guidelines in relation to Art.6 can be best tailored to reflect Turkey’s experience with Art.6. This Chapter critically analysed the Guidelines on Art.6 in order to determine to what extent they reflect the enforcement of Art.6 and pointed to Turkey’s own needs which were left outside the scope of these Guidelines. It provided a comparative analysis of the contributions of the Guidelines on Art.6 with the Guidance and the established case law on Art.6 in Section 5.1, addressed the historical and/or current issues in the enforcement of Art.6 in Turkey that were left outside the scope of the Guidelines on Art.6 in Section 5.2, and finally speculated on the future of the Guidelines on Art.6 in Section 5.3 by exploring whether the TCA will abide by its own Guidelines in its future decisional practice and what the reaction of the appellate courts to the Guidelines on Art.6 will be. Section 5.1 observed that majority of the contributions of the Guidelines on Art.6 in fact already existed in the decisional practice of the TCA especially in the aftermath of the Guidance, and while the general assessments of the Guidelines on Art.6 are to a great extent in line with the case law on Art.6, the specific assessments on for specific forms of conduct largely differ from those in the case law. Section 5.2 observed that the absence of any guidance on the problematic areas that are peculiar to Turkish competition law undermines predictability and legal certainty as aimed by the Guidelines on Art.6 in the first place. Finally, Section 5.3 observed that based on some of its previous decisions that referred to the Guidance and even the draft Guidelines on Art.6, the TCA is expected to

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<sup>132</sup> Anonymous interviewee, 28/02/2014, Ankara.

abide by its Guidelines on Art.6 in its future decisions, just as the appellate courts are expected to raise no objections so long as the TCA interprets these Guidelines in accordance with the statutory text of the Act.

## THESIS CONCLUSION

This thesis discussed the need for adopting Guidelines in relation to Art.6 in Turkish competition law and gave reflections on the legal regime and substantive content of Guidelines in relation to Art.6 that can be best tailored to the enforcement of Art.6 by the TCA and the Turkish Appellate Courts. This thesis is timely in that “Guidelines on the Assessment of Abusive Exclusionary Conduct by Dominant Undertakings” were published in Turkey in April 2014. Being the first original research on the Guidelines on Art.6, it critically analysed the significant aspects of these Guidelines in the light of the national experience of Turkey with Art.6 while fully taking into account the EU competition law context. The thesis is enhanced by qualitative empirical data obtained as a result of a series of research interviews made with some selected members of the internal staff of the TCA, lawyers, judges and academics in Turkey.

Even a cursory analysis of the Guidelines on Art.6 revealed that they mirror the Commission’s Guidance in terms of both structure and content. Because the Guidelines on Art.6 are closely modelled on the Guidance, the research would not be complete without a discussion of the Guidance. Since the Guidance does not exist in vacuum and is yet the final formal stage in the modernisation of Art.102, the inquiry started with the modernisation of Art.102. For this reason, Part I of the thesis was devoted to the analysis of the modernisation and the Guidance. Chapter 1 provided answers to the first and foremost question as to why Art.102 was subject to a modernisation process. This Chapter discussed the reasons that paved the way for the modernisation by shedding light on the text of Art.102, its objectives, and the case law and key literature on Art.102. Chapter 1 observed that some guidance on Art.102 was much-needed because of the fact that the text of the Article was silent on the meaning of abuse and on the objective(s) of the Article, the definition of abuse by the EU Courts was rather unsatisfactory and provided no methodology for identifying its scope, distinguishing legal conduct from abusive conduct was challenging and finally there was a lack of coherent analytical approach in the case law.

Against this backdrop, Chapter 1 found that mainly because of the old case law on Art.102 which had been subject to heavy criticism for being formalistic and lacking

economic arguments or efficiency considerations, the Commission engaged in the modernisation of the way it enforced Art.102 with a view to bringing the Article into line with the modern economic thinking on unilateral conduct. Because the old case law on Art.102 was being heavily criticised in the literature and became no longer consistent with the other pillars of EU competition law after the modernisation of Art.101 TFEU and merger control, the Commission had no choice but to adopt a modernised approach to Art.102, one that would reflect the advances in the modern economic thinking on unilateral conduct. Taking the inquiry further, Chapter 2 analysed the changes that occurred in the Commission's approach towards the interpretation of abuse of a dominant position with the modernisation of Art.102. This Chapter observed that the modernisation involved a reorientation in the Commission's reading of Art.102 with respect to a greater recognition of efficiency, effects-based assessments and proof of consumer harm in Art.102 cases. Chapter 2 concluded that with the modernisation, the Commission aimed to steer the enforcement of Art.102 from a heavy reliance on the special responsibility towards a greater recognition of efficiency, from a form-based approach towards an effects-based approach into unilateral conduct, and lastly from the analysis of harm to competitors to consumer harm.

The very reason why the Commission had engaged in the modernisation created at the same time the problem that tied its hands. Adoption of this new approach would inevitably require a certain degree of departure from the case law of the EU Courts and if these Courts did not alter their interpretation, the Commission could not legally do this on its own as an administrative body. However, the Commission was clever: Although the EU Courts have the power to interpret Art.102, the Commission resorted to its powers of enforcement within its legal remit. The main outcome of the modernisation of Art.102, the Guidance, only set out the Commission's enforcement priorities. Devoted to the analysis of the Guidance, Chapter 3 began by examining the purpose and legal regime of the Guidance, and drew attention to the fact that the Guidance was not "Guidelines" from a legal point of view. Partly for this reason and partly because of other aspects, the Guidance had caused a great deal of controversy arising from its title to its substantive content among commentators. This debate on the Guidance was extensively addressed in Chapter 3. The Chapter proceeded with the contributions of the Guidance to the enforcement of Art.102



and observed that the concept of anti-competitive foreclosure, the “as efficient competitor” test, efficiency defence and detailed assessments on specific forms of abusive exclusionary conduct stood out as the most novel parts and contributions, all of which would promote a modernised approach to Art.102.

The first contribution of the thesis to the research literature on Art.102 and its implications in Turkey was made in Chapter 3 with the analysis of the enforcement of Art.102 in the post-Guidance period. This thesis is timely in that it enjoyed the advantage of articulating what has *actually* happened after the issue of the Guidance, rather than to merely *speculate* on the future of the Guidance as had been done in most scholarly works. In dealing with the question as to how the enforcement of Art.102 has been shaped in the post-Guidance period; the Chapter explored whether the Commission stuck to the principles in the Guidance, whether the assessments of the Commission in its post-Guidance decisions were in line with its “enforcement priorities”, what types of abuses were taken up by the Commission, how the allegations of abuse of a dominant position appeared and finally how the EU Courts reacted to the Commission’s new reading of Art.102. As an original contribution, Chapter 3 found that Art.9 Regulation 1/2003 commitments mark another, albeit informal, stage in the modernisation of Art.102, as the Commission’s increasing use of such commitments outstripped many practical discussions that were expected to take place after the issue of the Guidance and instead created new problems on the appropriateness, legal review and excessive use of commitments in Art.102 cases. The Chapter noted that this informal stage would be unlikely to be a positive stage in contrast to the previous successful stages and may result in a change backwards in the modernisation of Art.102, if the Commission reneges on the Guidance in Art.9 commitments and continues to satisfy with “preliminary assessments” instead of making rigorous effects-based assessments.

Having completed Part I, the thesis shifted the focus of the inquiry to Turkey. The first chapter of Part II, Chapter 4, provided answers to the first main research question as to whether there is a need for Guidelines in relation to Art.6 in Turkey. This Chapter began by discussing the functions of Guidelines as soft law instruments and draws some theoretical conclusions for Turkey on the likely benefits and costs of adopting Guidelines in relation to

Art.6. It found that the TCA and other State authorities in Turkey explicitly stressed the need for adopting Guidelines in relation to Art.6 which would theoretically provide transparency and predictability, increase legal certainty and minimise inconsistencies in the decisions of the TCA, while resulting in a voluntary restraint on the discretion of the TCA. Chapter 4 proceeded with a relevant issue in this respect, namely the impact of Turkey's accession to the EU on the adoption of Guidelines in relation to Art.6. It found that mostly because of the *sui generis* nature of the Guidance as a soft law instrument, Turkey's duty to harmonise its national competition law with the EU *acquis* under the Decision No 1/95 of the EC-Turkey Association Council does not *de jure* require the country to transpose the Guidance into Turkish competition law. The past experience of the country, however, showed that Turkey had a fair track record of transposing the applicable EU block exemption Regulations and Guidelines, and Guidelines in relation to Art.6 would, as the Chapter observed, highly unlikely to be an exception to this pattern.

Chapter 4 was enriched by qualitative empirical data obtained as a result of a series of research interviews made with (1) the internal staff of the TCA; (2) the lawyers who specialise in competition law cases in Turkey; (3) the judges within the 13<sup>th</sup> Chamber of the Council of State; and (4) the academics who have their research interests in Art.6 or have published widely on competition law in Turkey. Although the results were not representative, they showed that the overwhelming majority of the interviewees found that the decisions of the TCA were inconsistent and the judgments of the Council of State were far from providing any guidance on Art.6. Majority of the interviewees expressed that there was a need for reform. While all of the members of the internal staff of the TCA and the lawyers felt a need for Guidelines in their personal experience, the judges seemed rather reluctant to the adoption of Guidelines in relation to Art.6 and took the view that such Guidelines would have a limited impact on the judicial review of the decisions of the TCA on Art.6. In addition; "consistency", "predictability" and "fulfilling the gap on Art.6 which was the only area left without any guidance" were the most cited reasons among the interviewees for the adoption of Guidelines in relation to Art.6. Put different way, the reasons that paved the way for the issue of the Guidance, namely switching to an effects-based and a consumer welfare-oriented approach, were not considered.

The overwhelming majority of the interviewees expressed that Turkey should publish its own Guidelines in relation to Art.6, but should nevertheless benefit from the Guidance. The interviewees noted that Turkey's own needs should not be disregarded if Guidelines in relation to Art.6 were to be issued; however, not all interviewees precisely mentioned what those needs were. On the first additional interview question as to whether Guidelines in relation to Art.6 should be in the form of "Guidelines" or "enforcement priorities" just like the Guidance, most of the interviewees who answered this question expressed that Guidelines in relation to Art.6 should be in the form of Guidelines suggesting that the reasons in the EU for the preference of enforcement priorities did not exist in Turkey. Consequently, the interviews showed that the enforcers of Art.6 and the legal counsel of the addresses of Art.6 seemed to be "speaking the same language"; they shared similar opinions and beliefs with regard to the inconsistency of the case law and the need for adopting Guidelines in relation to Art.6 which should take into Turkey's own needs. The judges provided the most radical answers and seemed rather reluctant to the adoption of Guidelines in relation to Art.6. The academics, while agreeing on the inconsistency of the case law, sent mixed signals on the need for Guidelines in that they did not object to the adoption of Guidelines in relation to Art.6, but did not advocate such need as strongly as the internal staff of the TCA and the lawyers.

Taking further the findings of Chapter 4 on the need for Guidelines in relation to Art.6, Chapter 5 provided answers to the second main research question as to how these Guidelines can be best tailored to reflect Turkey's experience with Art.6. The second original contribution of the thesis to the existing research literature was made in this Chapter. Within this context, this Chapter provided a critical and comparative analysis of the Guidelines on Art.6 with the contributions of the Guidance and the established case law on Art.6 with a view to showing to what extent the Guidelines on Art.6 reflected the national experience with Art.6. Chapter 5 observed that even before the publication of the Guidelines on Art.6, the state of the case law on Art.6 was in line with the Commission's new reading of Art.102 and even more advanced than the case law on Art.102 in many areas. It found that a strong emphasis was placed on the consumer welfare objective in Turkish competition law from the outset, the TCA became more disposed to make economic analysis especially after the issue of the Guidance and its recent decisions

indicated a high level of effects-based analyses, the traces of anti-competitive foreclosure and the “as efficient competitor” test were seen in some recent decisions, efficiency had been the foremost criterion in the assessment of abusive conduct and the TCA was not “sentimental” to inefficient undertakings, efficiency defence had been well established in Turkish competition law and finally the TCA already accepted the notion that the allegedly abusive conduct may in fact generate efficiencies.

Therefore, the general assessments of the Guidelines on Art.6 were not found to have radically differed from the established case law on Art.6. However, the same was not the case with the specific forms of abusive conduct. Chapter 5 observed that the specific assessments in the Guidelines on Art.6 bore many similarities to those set out in the Guidance, but showed divergence from the established case law on Art.6. On refusal to deal, exclusivity, rebates and tying; the necessary conditions for these forms of conduct to amount to an abuse largely differed from those in the case law. Only the conditions for margin squeeze, and partly predatory pricing with the exception of new cost benchmarks, were found to be in line with the case law. Notwithstanding, the Chapter noted that in terms of harmonising the assessments of the Guidance with the existing decisions of the TCA on Art.6, the subsection on margin squeeze was excellent, the subsections on exclusivity and tying were very good, the subsection on refusal to deal was good, whereas the subsection on predatory pricing contradicted with the case law which put greater emphasis on the intention and recoupment elements and finally the subsection on rebates failed to provide legal certainty to undertakings and involved assessment techniques which were hard to properly implement in practice. One notable feature of the case law on Art.6 was, as the Chapter argued, that contrary to EU competition law; exclusive dealing, rebates and tying had never been subject to a *per se* illegality in Turkish competition law and in this respect, the TCA recognised that they may generate many pro-competitive effects.

Chapter 5 proceeded with the discussion of the most problematic historical and/or current issues on Art.6 in Turkey which should have been addressed in the Guidelines on Art.6, but were left outside their scope as a result of the adoption of the Guidance. This Chapter determined that with the transposition of the Guidance, the content and contributions of the Guidance were injected into Turkish competition law; therefore, the

subjects that were left outside the scope of the Guidance did not also fall into the scope of the Guidelines on Art.6 either. It observed that the scope of the Guidelines on Art.6 was limited to exclusionary abuses, and thus exploitative and discriminatory abuses were left outside the scope. The Chapter argued that the Guidelines on Art.6 left unanswered many questions on exploitative abuses, in particular excessive pricing, allegations of which were very common in the decisional practice of the TCA. In the area of exploitative abuses, the Guidelines on Art.6 thus failed to provide legal certainty for undertaking and to meet the expectations of their legal counsel. As for discriminatory abuses, the Chapter observed that there was a need for guidance both because of the case law was inconsistent in similar situations and the statutory text of Art.6 was liable to wrongly apply to essentially pro-competitive conduct. The Guidelines on Art.6 also excluded collective dominance from its scope just like the Guidance, but the Chapter argued that this raised no problem.

Exclusion of the needs of Turkey from the scope of the Guidelines on Art.6 was also discussed in Chapter 5. The Chapter argued that the intersection of competition law with sector-specific regulation, and the relations between the TCA and sectoral regulators in Art.6 cases were not discussed in the Guidelines on Art.6. This issue was found to have created uncertainties in the enforcement of Art.6 and many controversial infringement decisions of the TCA concerned the telecom sector where significant fines were imposed on telecom companies. Also the Guidelines on Art.6 did not offer any guidance on the reference to “aim” in the subparagraphs (a) and (d) of Art.6, which had caused a great deal of controversy in the enforcement of this Article due to the literal interpretation of the Council of State. Similarly, the subparagraph (a) created another problem in the enforcement of Art.6 as it was capable of wrongly condemning a very broad set of practices which may be pro-competitive and the Guidelines on Art.6 failed to include the narrow interpretation the TCA adopted in some of its past decisions. Finally, the Chapter examined the observations of different interviewee groups on the areas they deemed as problematic in the enforcement of Art.6 and concluded that while the Guidelines on Art.6 addressed some of those problematic areas such as the role of intention, they were silent on many other problematic areas such as the relationship between Art.6 and Art.4, cost calculation and selective above cost pricing.

Just as the thesis analysed the post-Guidance period after 2009, the future of the Guidelines of Art.6 was not left outside the scope of the inquiry either. Chapter 5 speculated on the future of the Guidelines on Art.6 by exploring whether the TCA would abide by its own Guidelines in its future decisional practice and what the reaction of the appellate courts to the Guidelines on Art.6 would be. It drew attention to the risk of legal uncertainty for dominant undertakings in the case of non-compliance of the TCA with its own Guidelines, but argued that since the TCA often made reference to EU competition law, to the Guidance and even to the draft Guidelines on Art.6 in its decisional practice, it would be willing to apply and abide by the Guidelines on Art.6 in its future decisions. It further argued that apart from the problem caused as a result of the literal interpretation of the statutory text of Art.6, the Council of State was not expected to raise objections to the Guidelines on Art.6 in general. The reaction of the Ankara Administrative Court, the Chapter maintained, was difficult to predict as its judgments were limited in number since it began to perform judicial review only after July 2012. Chapter 5 concluded that being the first piece of secondary legislation on Art.6 and having a vast support from the interviewed members of internal staff of the TCA, lawyers and academics in Turkey, the Guidelines on Art.6 would contribute to the establishment of a coherent policy on abuse of a dominant position in Turkey, though they could have resolved many problematic areas in the enforcement of Art.6.

Based on this summary of findings, the following five conclusions can be derived. First, there is a need for Guidelines in relation to Art.6 in Turkish competition law for three reasons: To start with, the TCA and other State authorities, such as the State Supervisory Council, explicitly stressed the need for adopting Guidelines in relation to Art.6. Second, the analysis of the existing case law on Art.6 shows that there are considerable inconsistencies, especially with regard to specific forms of abusive conduct, which make it difficult to achieve general rules from case-by-case analyses. This issue is likely to create uncertainty for dominant undertakings in Turkey and paves the way for adopting Guidelines in order to ensure a certain level of predictability. Third, the research interviews articulate that all of the members of internal staff of the TCA and the lawyers, as well as some academics in Turkey, who were interviewed for the purpose of this thesis, felt the

need for Guidelines in their personal experience with Art.6. Being the first secondary legislation on Art.6, the Guidelines on Art.6 have thus met this need.

Second, the Guidance can be used as a model when adopting Guidelines in relation to Art.6 also for three reasons: First, although Turkey's duty of harmonisation does not *de jure* require the country to transpose the Guidance into Turkish competition law, the past experience of the country showed that Turkey has a fair track record of transposing the applicable EU block exemption Regulations and Guidelines, which implies that the transposition of the Guidance would follow this trend as well. Second, the TCA began to align its decisions on Art.6 with the orientations of the Guidance years before the Guidelines on Art.6 came out and therefore it was highly unlikely that the Guidelines on Art.6 would show pivotal differences from its EU counterpart. Third, the research interviews articulated that the overwhelming majority of the interviewees expressed that Turkey should publish its own Guidelines, but should nevertheless benefit from the Guidance in this respect. In other words, issuing fully independent Turkish Guidelines did not attract so much sympathy.

Third, because the Guidelines on Art.6 are closely modelled on the Guidance, it is hard to argue that the Guidelines on Art.6 have fully suited to the needs of Turkey. The transposition of the Guidance has resulted in the exclusion of the problematic areas in the enforcement of Art.6. The Guidelines on Art.6 are a missed opportunity to offer much-needed guidance on excessive pricing as one of the most common types of abusive conduct in the enforcement of Art.6. They could have clarified many points on discriminatory abuses as well. In addition, the intersection of competition law with sector-specific regulation and the relations between the TCA and sectoral regulators in Art.6 cases, clarification of the reference to aim in the subparagraphs (a) and (d) of Art.6 and the TCA's narrow interpretation of the subparagraph (a) should have been explained to undertakings in these Guidelines. All in all, the lack of guidance on the problematic areas that are peculiar to Turkey undermines predictability and legal certainty as aimed by para.3 of the Guidelines on Art.6 in the first place.

Fourth, despite having been modelled on the Guidance, the general assessments on unilateral exclusionary conduct in the Guidelines on Art.6 are in line with the established

case law on Art.6. In other words, even before the publication of the Guidelines on Art.6, decisions of the TCA reflect the Commission's new reading of Art.102. For this reason, a radical shift in the enforcement policy is highly unlikely. On the other hand, the specific assessments on specific types of abusive exclusionary conduct in the Guidelines on Art.6, especially the subsections on refusal to deal, exclusivity, rebates and tying, largely differ from those in the established case law. However, this does not mean that the TCA should insist on its past assessments; by building the enforcement of Art.6 on these new assessments, future decisions of the TCA will be more consistent with the effects-based and consumer welfare-oriented spirit of the Guidelines on Art.6, as well as with each other in similar cases with similar facts.

Finally, the future of the Guidelines on Art.6 seems straightforward. Because the general assessments of the Guidelines on Art.6 do not considerably depart from those in the established case law, the discussion on whether the Turkish Appellate Courts would endorse or reject these Guidelines is irrelevant in Turkish competition law, in contrast to EU competition law where a similar discussion has led to one of the most questioned issues after the publication of the Guidance. Instead, the real problem in the context of Turkish competition law is the literal interpretation technique adopted by the Council of State which reviews the decisions of the TCA on the ground of strict compliance with the statutory text of Art.6. The future will show which assessments in the Guidelines on Art.6 will be held contrary to the text of Art.6 by the Council of State. On the other hand, it will take some time for the Ankara Administrative Court to become "familiar" with competition law in order to properly examine contentious substantive issues in the decisions of the TCA. Against this backdrop, a new or revised edition of the Guidelines on Art.6 seems likely later rather than sooner in the foreseeable future.



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## **ANNEX I – REFLECTIONS ON RESEARCH INTERVIEWS**

### **§. Introduction**

As discussed in “IV. Methodology”, a complementary methodology employed in this thesis is empirical research in the form of qualitative research interviews. The author of this thesis had applied to “Social Sciences/Arts Cross-School Research Ethics Committee” for the necessary ethics approval on December 13, 2013 and received the “Certificate of Approval” with the Reference No “ER/AO237/1” on January 15, 2014. The expected start date of the project was February 2, 2014 and the first research interview was successfully carried out on February 20, 2014. All research interviews took place in Turkey, in particular in Ankara and Istanbul, in a convenient atmosphere which was sufficiently private to provide answers. In order to ensure that no language barrier would create an obstacle to interviewees, all interviews were made in their native language, Turkish.

The conditions for all interviews were similar: All of the participants received a Participant Information Sheet and signed a Consent Form. The participants agreed that they would be interviewed by the author, allowed the interview to be audio taped and finally allowed the author to anonymously use in this thesis the information they provided. They understood that no information that they disclosed would lead to the identification of any individual. They were reminded that their participation was voluntary, and they could choose not to participate in the interview and withdraw at any stage of the project without being penalised or disadvantaged in any way. Finally, they gave their consent to the processing of their personal information which would be treated as strictly confidential. None of the interviews involved any risk or disadvantage to the author or to the interviewees.

A total number of 23 interviews were made within a period of 4.5 months. Majority of the interviews were made face-to-face and recorded using a tape recorder in order to both preserve the original data and give more confidence to the interviewees. Two interviewees refused to be audio taped and in such cases, the transcripts of the relevant interview were sent to those interviewees for verification of their answers. Another two interviewees preferred to send their replies via e-mail; therefore, they were not audio taped

either. One potential interviewee answered the questions, but later decided not to sign the Consent Form as they thought their answers did not reflect what they intended to say. Five potential interviewees agreed on principle to take part in an interview, but mostly indefinitely delayed the date or did not show up on the agreed date.

### **§. Interviewee Groups**

The interviews involved a rational logical discourse between the author of this thesis as the interviewer and different groups of interviewees. With a view to achieving a wider level of representation in qualitative research interviews, the author tried to identify as many focus groups as possible. Each with different backgrounds, four different interviewee groups were identified as follows:

1. The internal staff of the TCA
  - a. Senior competition experts and other high-ranked officials,
  - b. Competition experts who worked on Art.6 cases,
  - c. The members of the commission who prepared the Guidelines on Art.6,
2. The lawyers who specialise in competition law cases in Turkey,
3. The judges within the 13<sup>th</sup> Chamber of the Council of State, and
4. The academics who have their research interests in Art.6 or who have published widely in competition law in Turkey.

Group 1 is further divided into three groups. Group 1(a), namely senior competition experts and other high-ranked officials, were chosen because of the fact that they had over 10 years of experience in enforcing competition law, regardless of whether they were specialised in Art.6 cases. Group 1(b), namely competition experts who worked on Art.6 cases, were chosen due to their specific experience in Art.6 cases. Lastly, Group 1(c), namely the members of the commission who prepared the Guidelines on Art.6, were targeted due to their long efforts in reviewing the existing case law on Art.6 during the preparation of the Guidelines on Art.6 and them being knowledgeable about the Guidance and the developments in EU competition law in general. In order to avoid a potential bias on the part of the members of the commission who prepared the Guidelines on Art.6 towards the adoption of Guidelines in relation to Art.6 after their long endeavours, the

author also carried out interviews with competition experts, senior competition experts and other high-ranked officials within the TCA.

Group 2, namely the lawyers who specialise in competition law cases in Turkey, were chosen in order to discuss the opinions of the legal counsel of dominant undertakings as the addressees of Art.6 *vis-à-vis* the opinions of the internal staff of the TCA as the enforcers of Art.6. On the other hand, dominant firms were left outside the scope of interviews mainly due to inherent difficulties in defining their dominant position by the author of this thesis. Furthermore, a lack of objective criteria in the selection process, for example why a certain dominant firm was selected at the expense of the others, was found liable to prevent the collection of sound empirical data. In addition, consumer groups were also left outside the scope of the interviews due to the marginal role they play in the context of competition law in Turkey.

Group 3, namely the judges within the 13<sup>th</sup> Chamber of the Council of State, were chosen to enrich the discussions by shedding light on the views from the judiciary. Mostly because of the problem of bias judge, the judges within the 13<sup>th</sup> Chamber of the Council of State were reluctant to take part in an interview which would possibly result in the disclosure of their opinions. The president of the 13<sup>th</sup> Chamber referred the author to two advocate generals (investigating judges), who were the only advocate generals specialised in competition cases within all the chambers of the Council of State. At the end, a joint interview was made with those two advocate generals. Interviews were made only with the judges within the Council of State, because of the fact that no case allocation is made within the Ankara Administrative Court. Since a competition case can be reviewed by any chamber of the Ankara Administrative Court depending on the workload and backlog of cases, judges within this Court are yet to be specialised in competition law.

Lastly; Group 4, namely the academics who have their research interests in Art.6 or who have published widely in competition law in Turkey, were targeted in order to include into the thesis some views from the academia. The academics who were interviewed for the purposes of this thesis were based inside Turkey and published in Turkish or European academic outlets either in Turkish or in English.

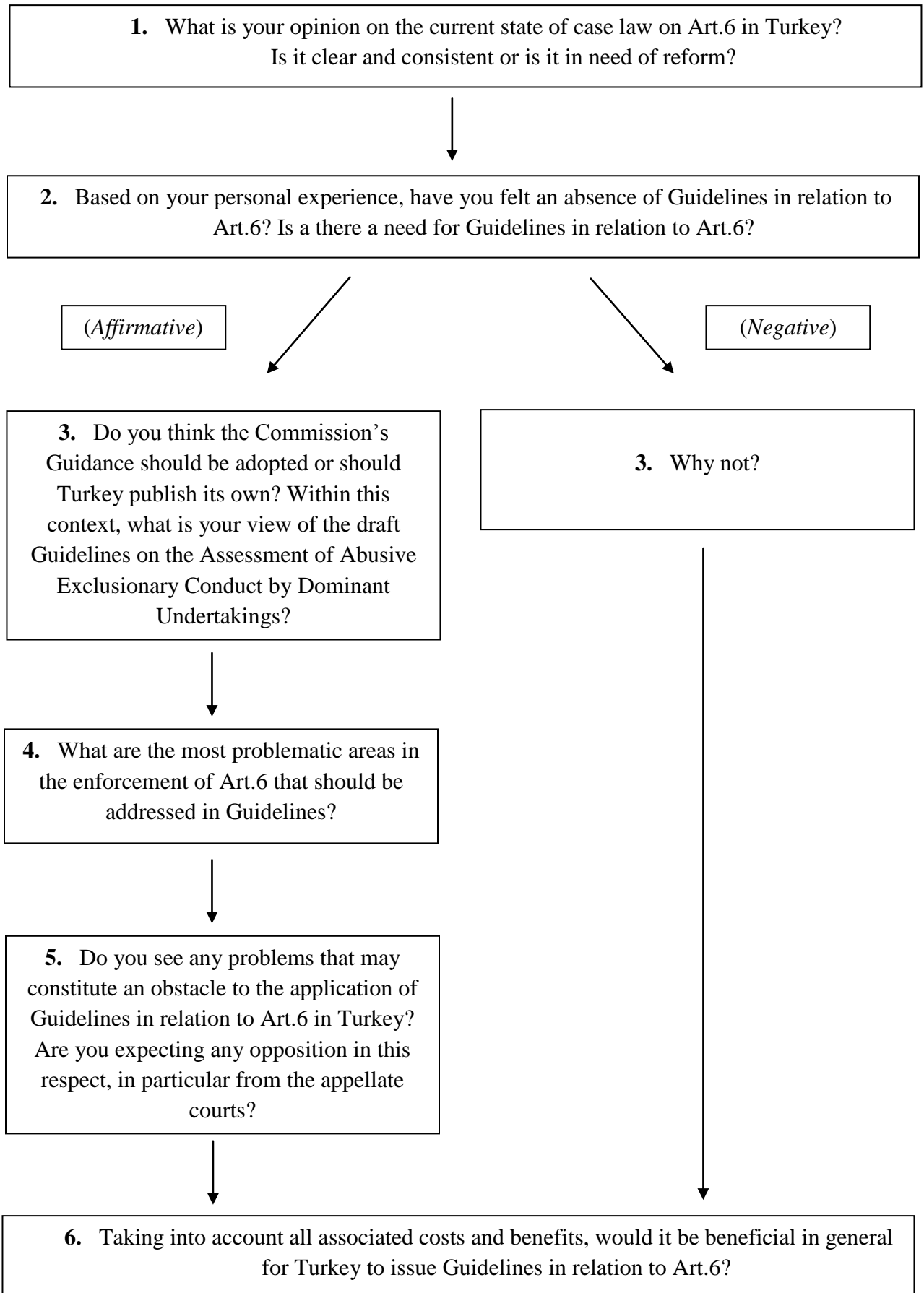
## §. Interview Questions

The interview questions were designed in a semi-structured way that aimed to collect qualitative data: The interview questions had a structure and a pre-determined sequence and were thus not totally unstructured. Likewise, they were not tightly structured either, as there was no long list of survey-style yes/no questions. The number of questions was intended to be optimal in that the interviewees were asked 4-6 main interview questions depending on both the interview groups and their answers. The main interview questions were the same for all interviewees.

The following main interview questions were asked to all interviewee groups:

1. What is your opinion on the current state of case law on Art.6 in Turkey? Is it clear and consistent or is it in need of reform?
2. Based on your personal experience, have you felt an absence of Guidelines in relation to Art.6? Is there a need for Guidelines in relation to Art.6?
3. *(If the answer to the above question is in the affirmative)* Do you think the Commission's Guidance should be adopted or should Turkey publish its own? Within this context, what is your view of the draft Guidelines on the Assessment of Abusive Exclusionary Conduct by Dominant Undertakings? *(If the answer to the above question is in the negative)* Why not?
4. *(Only if the answer to the second question is in the affirmative)* What are the most problematic areas in the enforcement of Art.6 that should be addressed in Guidelines?
5. *(Only if the answer to the second question is in the affirmative)* Do you see any problems that may constitute an obstacle to the application of Guidelines in relation to Art.6 in Turkey? Are you expecting any opposition in this respect, in particular from the appellate courts?
6. Taking into account all associated costs and benefits, would it be beneficial in general for Turkey to issue Guidelines in relation to Art.6?

Figure A shows the sequence of the main interview questions:

**Figure A – The Sequence of Main Interview Questions**

In addition to the abovementioned main interview questions, the following additional interview questions were asked to two specific interviewee groups:

- i. As a member of staff within the TCA, do you think Guidelines in relation to Art.6 should be in the form of “enforcement priorities” as well, just as the Guidance? (*to Group I(b)*)
- ii. How many replies have there been to the draft Guidelines on Art.6? What weight was attached to those replies? (*to Group I(c)*)

### **§. Explanation of the Interview Questions**

The first question was intended to be an opening question whereby the interviewees were asked to comment on the state of the existing case law on Art.6 and the enforcement of Art.6 in general. To limit the time the interviewees may need to think for their answers, this question was followed by a leading question. The leading question aimed to narrow the scope of the question to more concrete and focused answers.

The second question aimed to discover the personal experience of the interviewees with regard to the subject matter of the thesis and to seek the professional opinion of the interviewees. Based on the answer to the second question, the interviewees were asked a different question as the third question. If their answer to the second question was in the negative, the interviewees were simply asked to provide reasons.

If their answer to the second question was in the positive, the interviewees were asked to compare the Guidance with Turkey’s own Guidelines on Art.6 as to which would better suit to the needs of Turkish competition law. As a follow-up question, the interviewees were asked for their opinion on the draft Guidelines on Art.6, which later went into force, with a view to evaluating whether they mirrored the Guidance. However, as none of the respondents directly answered in the negative, all respondents were asked all of the main questions.

The fourth question was a more open question whereby the interviewees were asked to list the areas they deemed as problematic in the enforcement of Art.6. The rationale behind this question was to point out the potential problems in the enforcement of this

Article so that they could be addressed when the TCA issued Guidelines in relation to Art.6. Therefore, this question aimed to seek practical knowledge which was often not available in published scholarly works.

The fifth question was concerned with the future of Guidelines in relation to Art.6 and the interviewees were asked to speculate in this respect. To help the interviewees to limit the scope of the question, as well as the time they needed to think, this question was followed by a leading question. The leading question aimed to narrow the scope of the question to more concrete and focused answers.

The six and the last main interview question was intended to summarise the answers of the interviewees to the preceding questions whereby the interviewees were asked as to whether the issue of Guidelines in relation to Art.6 would be in general beneficial for Turkey. The question was simply answerable with a yes or no, but the interviewees were free to add whatever they thought was relevant.

As for the additional interview questions, the first question was directed to Group 1(b), namely competition experts who worked on Art.6 cases. The interviewees were asked for their opinion on the legal status of Guidelines in relation to Art.6 as to whether they should set enforcement priorities or simply be issued in the form of Guidelines. The interviewees within Group 1(b) were deemed as the most appropriate target that would provide accurate answers to this technical question as they were highly involved in the day to day enforcement of Art.6.

The second additional interview question was directed to Group 1(c), namely the members of the commission who prepared the then draft Guidelines on Art.6. The interviewees were asked to provide information about the replies to the draft Guidelines on Art.6 during the public consultation and how they were evaluated by the TCA. As those members were given the task to work on the publication of the Guidelines on Art.6, naturally they were the most appropriate interviewees for this additional question.

However, the second interview question was not used in the thesis. This is because replies to the public consultation of the draft Guidelines on Art.6 were not shared with public. Furthermore, the author's request for information under the Right to Information

Act 2003 in relation to grant of access to such replies was rejected by the TCA with the letter no: 21267916-622-8899, dated 12/08/2014 due to issues of confidentiality. Without personally seeing and analysing the replies to the draft Guidelines and the issues raised by the respondents therein, the author then decided not to deal with this question in the thesis.

### **§. Reporting of the Interview Data**

Based on the relevancy of the interview questions to the subject matter of the thesis chapters in question, the responses to the first three main interview questions and the first additional interview question were reported in Chapter 4 in Section “4.3 Guidelines on Art.6 in Practice”, while the responses to the last three interview questions were reported in Chapter 5, predominantly in Sections “5.2 Historical and Current Issues in the Enforcement of Art.6” and “5.3 The Future of the Guidelines on Art.6”. The vast amount of data was naturally reduced to what was of significance to the topic.

To make the author’s personal involvement and bias less visible, significant substantive elements from the statements of the interviewees were picked out and inserted to the thesis in the form of direct quotations in the interviewees’ own words. Attention must be paid to the fact that due to the particular nature of qualitative data obtained from qualitative research interviews, the views of the respondents may not be necessarily representative. Table A summarises the responses of all interviewees to the main interview questions on a spreadsheet.

All responses were anonymised throughout the thesis in line with the Consent Form which was duly signed by all interviewees. In incorporating the responses of the interviewees, the author preferred to use the date and place of interview rather than to assign each interviewee a letter or a number. In this author’s view, the latter approach would be liable to create an unnecessary complexity and could be problematic in terms of classification and anonymity, especially when there were few respondents in an interviewee group. Below is an example of the template that was used in footnotes to report the responses of the interviewees:

“Anonymous interviewee, 20/02/2014, Ankara”



Attention must be paid to the fact that numbers were added to distinguish between different interviewees when more than one respondent was interviewed. The following references show that two different interviewees were interviewed on the same date:

“Anonymous interviewee(1), 19/03/2014, Ankara”

“Anonymous interviewee(2), 19/03/2014, Ankara”

In cases where the interviewee decided to send their answers via e-mail, the date of interview was replaced with the word “email”. Below is an example of the template indicating such situation:

“Anonymous interviewee, 20/06/2014, (email)”

**Table A** - Record of Research Interviews

	<b>Interviewee</b>	<b>Date</b>	<b>Place</b>	<b>1.Consistent?</b>	<b>Clear?</b>	<b>Reform?</b>	<b>2.Need for Guidelines?</b>	<b>3.Own version?</b>	<b>5.Opposition?</b>	<b>6.Beneficial?</b>
<b>1.</b>	<b>Group 1(a)</b>	20/02/2014	Ankara	No	-	Yes	Yes	Yes	No	Yes
<b>2.</b>	<b>Group 1(c)</b>	21/02/2014	Ankara	No	-	Yes	Yes	Yes	Yes	Yes
<b>3.</b>	<b>Group 1(c)</b>	21/02/2014	Ankara	No	-	Yes	Yes	Yes	Yes	Yes
<b>4.</b>	<b>Group 1(a)</b>	24/02/2014	Ankara	-	-	-	Yes	Yes	No	Yes
<b>5.</b>	<b>Group 1(a)</b>	27/02/2014	Ankara	No	No	No	Yes	Yes	No	Yes
<b>6.</b>	<b>Group 2</b>	28/02/2014	Ankara	-	-	Yes	Yes	Yes	Yes	Yes
<b>7.</b>	<b>Group 1(c)</b>	04/03/2014	Ankara	No	-	Yes	Yes	Yes	No	Yes
<b>8.</b>	<b>Group 1(b)</b>	14/03/2014	Ankara	No	-	Yes	Yes	Yes	No	Yes
<b>9.</b>	<b>Group 1(b)</b>	19/03/2014	Ankara	No	No	-	Yes	Yes	No	Yes
<b>10.</b>	<b>Group 1(b)</b>	19/03/2014	Ankara	No	No	-	Yes	Yes	Yes	Yes
<b>11.</b>	<b>Group 1(b)</b>	22/03/2014	Ankara	-	-	-	Yes	Yes	Yes	Yes
<b>12.</b>	<b>Group 1(c)</b>	26/03/2014	Ankara	-	-	-	Yes	Yes	No	Yes

13.	Group 1(b)	03/04/2014	Ankara	-	No	No	Yes	Yes	No	Yes
14.	Group 3	09/04/2014	Ankara	Yes	-	-	No	Yes	-	No
15.	Group 3	09/04/2014	Ankara	-	-	-	No	Yes	-	No
16.	Group 2	16/04/2014	Ankara	No	-	Yes	Yes	Yes	No	Yes
17.	Group 1(b)	25/04/2014	Ankara	No	Yes	-	Yes	Yes	No	Yes
18.	Group 4	25/04/2014	Ankara	No	-	-	Yes	Yes	No	Yes
19.	Group 4	25/04/2014	Ankara	No	No	No	Yes	No	No	Yes
20.	Group 2	05/06/2014	Istanbul	No	No	-	Yes	Yes	No	Yes
21.	Group 2	19/06/2014	(email)	No	No	Yes	Yes	Yes	-	Yes
22.	Group 1(a)	20/06/2014	(email)	-	-	-	Yes	Yes	No	Yes
23.	Group 1(a)	10/07/2014	Ankara	-	-	-	Yes	-	No	Yes

## **§. Analysis of the Interview Data**

As discussed above, the interview questions were designed in a semi-structured way that aimed to collect qualitative data. The interview questions purported to contribute thematically to knowledge production. The emphasis of the interviews was on exploration rather than on hypothesis testing: By approaching the interview data with an open attitude, the author did not address the data with a set of hypotheses to test or validate a theory. Because the participants were already grouped into different groups in the first place, no sub-categorisation or profile crafting was made when analysing the interview data.

With the exception of the fourth interview question, the interview questions were mostly closed questions. Most of the time a simple yes/no provided the context, unless the interviewee decided to give reasons. The first and the fifth questions were followed by a leading question to maintain the relevancy of responses. Although the actual responses were unpredictable, the range of answers was in fact limited and there was not much room for diversity of answers. This facilitated the categorisation of answers.

On the other hand, a thematic analysis was used for the fourth interview question which was a more open question compared to other questions. The key themes (the problematic areas in the enforcement of Art.6) that arose out of the responses of the interviewees were picked out and reported under different categories.

Lastly, no computer-assisted qualitative data analysis software was used in reporting or analysing the interview data. With fewer than 30 responses, it was not efficient or effective to use such software.

## **ANNEX II – GUIDELINES ON THE ASSESSMENT OF ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS**

### **1. INTRODUCTION**

- (1) Article 6 of the Act no 4054 on the Protection of Competition (Act) prohibits the abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, while the second paragraph of the same article lists certain instances of abuse as examples.
- (2) In the application of article 6 of the Act, it is not in itself an infringement for an undertaking to hold dominant position, and undertakings are allowed to become more prominent competitively as a result of their internal efficiencies. However, the Act prohibits any practice of dominant undertakings that may reduce consumer welfare by exploiting the advantages of the market power they enjoy. In this respect, dominant undertakings are considered to have a "special responsibility" not to allow their conduct to restrict competition.<sup>1</sup>
- (3) Preventing an undertaking holding dominant position in a market from abusing that dominance assists in the better functioning of the markets and the competition process to the benefit of businesses and consumers. However, in many cases, identifying the line between abusive and competitive conduct calls for detailed examination and assessment. These Guidelines were published in order to describe the factors the Competition Board (Board) shall take into consideration when assessing exclusionary abusive conduct by dominant undertakings under article 6 of the Act, to increase transparency, and thus to minimize the uncertainties that may arise in the interpretation of the article by the undertakings. To that end, the Guidelines are intended to be instructive not only for dominant undertakings in a market, but also for other undertakings such as their competitors, customers and suppliers.
- (4) Even though article 6 of the Act prohibits the abuse of dominant position by one or more undertakings on their own or through agreements with others or through concerted practices, these Guidelines only include explanations concerning abusive conduct committed by undertakings holding single dominant positions.

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<sup>1</sup> See the Cine 5 decision of the 10th Chamber of the Council of State, numbered 2001/355 E., 2003/4245 K., as well as the Karbogaz decision of the Board numbered 05-80/1106-317.

- (5) Abuses of dominant position are generally categorized in three groups: exclusionary, exploitative and discriminatory abuses. Article 6 of the Act no 4054 does not include such a categorization concerning types of abuse. As well, in practice it is not possible to completely separate such conduct from each other for every case under examination. In other words, a conduct examined by the Board may serve as an example for more than one item listed in paragraph 2 article 6 of the Act, or it may carry the characteristics of more than one category of abuse. The main focus of Board examinations is to determine, in an economic perspective, whether article 6 of the Act was violated; the conduct does not necessarily need to comply in full with one of the examples given in the article.
- (6) The scope of the Guidelines is limited to only exclusionary abuses at this stage. Examples of abuse given in the Guidelines include those principles which will provide guidance for undertakings based on the most frequent cases of abuse; they are not intended to be comprehensive. It should be noted that the principles set out in the Guidelines shall be implemented on a case by case basis, in light of the specific circumstances of each file.

## **2. DOMINANT POSITION**

- (7) In order for a particular conduct examined under article 6 of the Act to constitute an infringement, the undertaking engaged in the conduct must hold dominant position in the market and the conduct itself must be of an abusive nature. Where the absence of one of these fundamental factors may be demonstrated, the Board may choose not to perform analysis concerning the remaining factor.<sup>2</sup>
- (8) The concept of dominant position has been defined in article 3 of the Act no 4054 as "The power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers". Within the framework of this definition, an undertaking with the power to behave to an appreciable extent independently from competitive pressure is considered to hold dominant position. Thus, an undertaking which can behave independently from competitive pressure is capable of profitably increasing its prices above the competitive level and maintain them at that level for a certain period of time.<sup>3</sup> In addition, such an undertaking would also be able to keep other factors including the level of production and distribution, the variety and/or quality of goods and services and

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<sup>2</sup> See the Board's Doğan Group TV Channels decision numbered 10-76/1569-604, Domino's Pizza decision numbered 10-69/1458-557, and GE Jenbacher decision numbered 11-57/1471-528.

<sup>3</sup> While for the purposes of determination of dominant position the relevant period of time can vary depending on the characteristics of the product and market under examination, it is generally accepted that a two-year period would be sufficient.

the level of innovation below the competitive level to its own advantage and to the detriment of consumers.

## **2.1. Market Definition**

- (9) In order to determine whether an undertaking holds dominant position, first it is necessary to define the relevant market (or markets). The definition of relevant market constitutes the basis for the assessment concerning whether the examined undertaking has the power to behave, to an appreciable extent, independently from competitive pressures in the market. The identification of relevant market has two dimensions: product and geographical region. “Guidelines on the Definition of Relevant Market”<sup>4</sup>, offer guidance concerning the definition of relevant market within the framework of the application of the Act. Therefore, the Guidelines herein shall include the criteria to be used in determining dominant position concerning an undertaking in a relevant market defined in accordance with the aforementioned Guidelines, and shall not address details concerning relevant market definition.

## **2.2. Determination of Dominant Position**

- (10) When assessing dominant position, what is examined in principle is to what extent the undertaking examined can act independently of competitive pressure. In this assessment, the specific facts of each case are taken into account. The main factors taken into consideration in dominant position assessment are the positions of the undertaking examined and its competitors in the relevant market, barriers to entry and expansion in the market, and bargaining power of buyers.

*Market positions of the undertaking examined and its competitors:*

- (11) For many relevant markets, the position of the undertaking examined in the relevant market is primarily indicated by the market share held by the undertaking. Depending on the nature of the activities under examination, market share is generally calculated based on the monetary value of sales or on sale volume. In its assessment, the Board can determine market share by taking the above criteria into account, together with one or more indicators such as capacity and reserve amounts depending on the characteristics of the market examined.
- (12) There is no specific market share threshold that proves an undertaking is dominant. However, the established practice of the Board, in the absence of any indication to the

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<sup>4</sup> Guidelines on the Definition of Relevant Market, 10.01.2008,  
<http://www.rekabet.gov.tr/dosyalar/kilavuz/kilavuz5.pdf>

contrary, is to accept that undertakings holding less than 40% of the market share are less likely to be dominant,<sup>5</sup> and more detailed examinations are conducted for undertakings with a higher market share.

- (13) In the first stage of this examination concerning actual competition, in addition to the market share of the undertaking concerned, the stability of this market share in time and the number and market shares of competitors operating in the relevant market are also taken into consideration. The larger and more stable the market share of the undertaking concerned, and the larger and more stable the differences between the market share of the undertaking concerned and those of its competitors, the less likely it will be for its current competitors to put competitive pressure on the undertaking concerned.
- (14) However, since market shares of undertakings are in constant fluctuation in tender markets, fast-growing markets and newly-established markets, it is not always possible to talk about market share stability and therefore market shares may cease to be a reliable indication for the market position of the undertaking. On the other hand, market shares are stronger indicators for saturated markets, which have an opposing structure.

*Barriers to entry and expansion:*

- (15) The above-listed indicators concerning the existing state of competition in the market are not, by themselves, sufficient to determine dominance. Within that framework, the second step in dominant position assessment is to examine whether there are barriers to entry into the market for new undertakings or whether there are barriers to expansion for undertakings already operating in the market. This is because the likelihood of expansion of undertakings operating in the market or of entry into market by new undertakings can also exert competitive pressure on the behavior of the undertaking examined. However, in order to be able to talk about such a pressure, expansion or entry must be likely, it must be timely and it must be sufficient.
- (16) For entry or expansion to be likely, it must be sufficiently profitable for the relevant undertaking, taking into account factors such as the reactions of the undertaking examined and other competitors operating in the market, as well as the risks and costs of failure. For expansion or entry to be timely, it must be sufficiently swift to make it useless for the undertaking examined to exercise its economic power and deter the undertaking from exercising said power. For expansion or entry to be considered sufficient, it must be of such

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<sup>5</sup> See the Board's Mediamarkt decision numbered 10-36/575-205, Pepsi Cola decision numbered 10-52/956-335 and Egetek decision numbered 10-62/1286-487. However, the Board acknowledges that an undertaking with less than 40% market share may also hold dominant position depending on the specifics of the market under examination. See Electricity Distribution Privatization decision numbered 10-78/1645-609.



a magnitude as to be able to prevent any attempt to increase prices by the undertaking under examination. These conditions can only be realized when there are no barriers to entry or expansion in the market.

- (17) Barriers to entry or expansion may stem from the characteristics of the relevant market or from the characteristics or behavior of the undertaking examined. Barriers stemming from the characteristics of the relevant market can take the form of legal and administrative barriers such as state monopolies,<sup>6</sup> authorization and licensing requirements<sup>7</sup> and intellectual property rights, or they can be in the form of economic barriers such as sunk costs, economies of scale and scope, network effects, and switching costs faced by customers.
- (18) Barriers stemming from the characteristics of the undertaking in question include those cases where the undertaking possesses key inputs and access to special information, spare capacity, a vertically integrated structure, a strong distribution network and a large product portfolio, high brand recognition, and financial and economic power. Such characteristics of the examined undertaking can make market entry or expansion by competitors harder by providing advantages to the undertaking over its actual or potential competitors.
- (19) In addition to the characteristics of the undertaking concerned, its conduct in the market can also present barriers to entry for potential competitors or to expansion for actual competitors. Examples to such conduct include the undertaking making large-scale investments which existing or potential competitors would have to match and concluding long-term contracts which may lead to appreciable foreclosure effects in the market.
- (20) The existence of any of the factors listed as examples for barriers to entry and expansion may not be considered, by itself, an indicator for dominance. In dominant position analysis all such factors must be evaluated together, with the relevant market examined to see how suitable it is for entries by new undertakings as well as for expansion of existing ones, and how much competitive pressure would potential entries and expansions place on the conduct of the undertaking examined.

*Buyer power:*

- (21) Factors affecting the conduct of an undertaking within the relevant market are not restricted to actual and potential competitors. In case customers of the undertaking examined are relatively large, sufficiently informed about alternative sources of supply and capable of

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<sup>6</sup> See the Board's Belko decision numbered 01-17/150-39.

<sup>7</sup> See the Board's Turkcell decision numbered 11-34/742-230.

switching to another supplier or creating their own supply within a reasonable period of time, then these customers may be said to have bargaining power, i.e. buyer power. In this case, buyer power of the customers will present as a competitive factor restricting the conduct of the undertaking examined and may prevent determination of dominant position for the undertaking. However, buyer power may be considered not to form sufficient competitive pressure if it only ensures that a limited segment of customers is shielded from the market power of the dominant undertaking.

### **3. ABUSE**

- (22) For a particular conduct examined under article 6 of the Act to be considered an infringement, not only the undertaking concerned must hold dominant position, but the conduct in question must have an abusive nature. Abuse may be defined as when a dominant undertaking takes advantages of its market power to engage in activities which are likely, directly or indirectly, to reduce consumer welfare. Abuse of dominant position by a dominant undertaking can lead to result that may harm consumer welfare including increases in prices, decreases in product quality and innovation level, and reduction in the variety of goods and services. This reduction in consumer welfare may emerge at the resale level or at the final consumer level.
- (23) Exclusionary abuses negatively affect efficient competition in the market and therefore lead to a decrease in consumer welfare. Such abuses may lead to foreclosure for rival undertakings as a result of the actions of the dominant undertaking against its competitors, and it may also lead to the exclusion of a certain portion of downstream undertakings from the market as a result of the actions of the dominant undertaking towards those of its customers which are not its competitors.
- (24) In the assessment of exclusionary conduct, in addition to the specific conditions of the conduct under examination, its actual or potential effects on the market should be taken into consideration as well. Such effects may emerge in the market where the undertaking is dominant, or they may emerge in other related markets.<sup>8</sup>
- (25) The basis of the Board evaluation on exclusionary conduct is the examination of whether the behavior of the dominant undertaking leads to actual or potential anti-competitive foreclosure. Anti-competitive foreclosure is the obstruction or prevention of access to sources of supply or markets for actual or potential competitors as a result of the conduct of the dominant undertaking, to the detriment of the consumers. Harm to consumers may

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<sup>8</sup> See the Board's Türk Telekom decision numbered 12-10/328-98.

occur in the form of increased prices, decreased product quality and level of innovation, and reduced variety of goods and services.

(26) When examining the presence of anti-competitive foreclosure, the Board, in general, takes the following points into account. The importance to be attached to the factors in question may vary on a case by case basis, depending on the nature of the conduct under examination.

- *The position of the dominant undertaking:* In general, the stronger the dominant position, the higher is the likelihood of the conduct resulting in anticompetitive foreclosure.
- *The conditions in the relevant market:* High barriers to entry and expansion increase the likelihood of the conduct under examination to foreclose the market. In that context, presence of entry and expansion conditions, such as economies of scale and/or scope and network effects are important. In case economies of scale exist, foreclosure of a significant part of the market by the dominant undertaking could make it harder for competitors to enter the market or stay in it. Similarly, abusive conduct may also allow the dominant undertaking to direct a market with network effects to its own advantage or in a way that would reinforce its own position. As well, high barriers to entry in the downstream and/or upstream markets may make it harder for competitors to overcome a potential foreclosure through vertical integration.
- *The position of the dominant undertaking's competitors:* In some cases even a competitor with a relatively low market share can place competitive pressure on the dominant undertaking. For instance, a competitor whose products are close substitutes for the products offered by the dominant undertaking, who has an innovative reputation or who can cut prices systematically may be in such a position. Another factor to consider when assessing the positions of the competitors of the dominant undertaking is whether it is likely for the competitors in question to develop counterstrategies that may render the conduct of the dominant undertaking ineffective.
- *The position of the customers or suppliers:* Another factor to examine in anticompetitive foreclosure analysis is whether the practice of the dominant undertaking has a selective nature. In some cases the dominant undertaking may target the practice under examination only to those customers or suppliers which have particular importance for the entry or expansion of competitors. Customers which can respond to offers from alternative suppliers, which have distribution methods suitable for new entrants, which are situated in a geographical region well-suited for new entry, or which are likely to affect the behavior of other customers may be considered to have particular importance. In terms of suppliers,

those who can be considered within this group are the suppliers with whom the dominant undertaking concluded exclusive agreements, or those who are more likely to respond to requests by customers who are competitors of the dominant undertaking in a downstream market, or those who manufacture the product type or in the region that is most suitable for a new entrant.

- *The scope and duration of the conduct examined:* In general, the higher the percentage of sales affected by the conduct within the total sales in the relevant market, the longer its duration, and the more regularly it has been applied, the greater is the likelihood of market foreclosure.
  - *Possible evidence of actual foreclosure:* If the conduct has been maintained for a certain period of time, the market performance of the dominant undertaking and its competitors may provide direct evidence of anti-competitive foreclosure. For reasons attributable to the allegedly abusive conduct, the market share of the dominant undertaking may have risen or a decline in market share may have been slowed. For similar reasons, actual competitors may have been marginalized or may have exited, or potential competitors may have tried to enter and failed.
  - *Direct or indirect evidence of exclusionary strategy:* The intent of the dominant undertaking when it engaged in the conduct under examination may also be taken into consideration. Basically, the intent may be identified through indirect evidence gathered as a result of deductions from the conduct in question, as well as through the use of direct evidence. Direct evidence includes internal documents of an exclusionary strategy, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market, or evidence of concrete threats of exclusionary action. Direct and indirect evidence may be used in a complementary manner when analyzing the intent.
- (27) In certain cases, abuse may emerge through the pricing practices of the dominant undertaking. Even though strong price competition is beneficial for consumers in the short term in general, there is a chance of anti-competitive foreclosure as a result of certain pricing practices of dominant undertakings. When evaluating any such foreclosure, the Board examines whether it is likely for a hypothetical competitor that is as efficient as the dominant position (equally efficient competitor) to be foreclosed as a result of the conduct under examination. This assessment examines economic data on costs and sale prices and, in particular, whether the dominant undertaking has engaged in below-cost pricing. While conducting the examination in question, primarily the costs of the dominant undertaking are

taken into consideration. In case no reliable data on these costs is available, then cost data of competitors or other comparable reliable data may be utilized.

- (28) If, using these data, the Board determines that an equally efficient competitor can effectively compete with the pricing practices of a dominant undertaking, in principle it will not intervene based on the consideration that the practice in question does not have a negative effect on effective competition, and thus on consumers. However, if the analysis of the aforementioned data shows that the pricing of the dominant undertaking has the potential to foreclose equally efficient competitors, then the Board will integrate this determination in its general assessment of anti-competitive foreclosure, taking into account other relevant quantitative and/or qualitative evidence.
- (29) On the other hand, recognizing that in certain exceptional circumstances a less efficient competitor may also gradually achieve a position to exert competitive pressure on the dominant undertaking by utilizing demand-related advantages, such as network and learning effects, the Board may also assess the (potential) effect of the pricing practice on these undertakings.

#### **4. JUSTIFICATION**

- (30) In the application of article 6 of the Act, the Board will also take into consideration any claims put forward by a dominant undertaking that its conduct is justified. Claims of justification examined by the Board may be classified under the categories of objective necessity and efficiency.
- (31) When assessing an objective necessity justification, the Board will first see whether the conduct protects a legitimate benefit and whether the conduct is indispensable for achieving the relevant benefit. As well, in order to consider the examined conduct objectively necessary, this conduct of the dominant undertaking must be caused by external factors (such as health and safety requirements set out by relevant public authorities) and the undertaking must not restrict competition more than necessary when protecting the benefit in question. The burden of proof for demonstrating that the conduct under examination is indispensable for protecting a legitimate benefit lies with the dominant undertaking.
- (32) When assessing the efficiency justification put forward by the undertaking under examination, the Board will expect the undertaking to prove that all four conditions listed below are fulfilled:
- the efficiencies should be realized or likely to be realized as a result of the conduct,
  - the conduct should be indispensable to the realization of those efficiencies,

- the likely efficiencies brought about by the conduct should outweigh any possible negative effects on competition and consumer welfare in the affected markets,
  - the conduct should not eliminate effective competition by removing all or most existing sources of actual or potential competition.
- (33) Examples of justification for each type of abuse listed below are given separately in the relevant section.

## **5. FORMS OF ABUSE**

- (34) When assessing claims of abuse of dominant position, in addition to the general approach explained above, the Board will take the following factors concerning the conduct under examination.

### **5.1. Refusal to Supply**

- (35) In competition law practice, it is acknowledged, in principal, that any undertaking, whether dominant or not, have the right to freely choose the undertakings with which they will do business and dispose of the assets under their ownership. Nonetheless, in certain exceptional circumstances, a refusal to supply by a dominant undertaking may be considered as behavior with restrictive effects on competition, and the dominant undertaking may be placed under an obligation to supply, within the framework of competition law.
- (36) Introducing an obligation to supply on dominant undertakings will generally lead to short-term benefits for consumers by increasing the number of undertakings active in the market. However, by preventing undertakings from receiving compensation for their investments and innovations, such an obligation imposed on dominant undertakings may pose the risk of causing a reduction in incentives for investment and innovation for both dominant undertakings and other undertakings and of leading to results to the detriment of consumers in the long-run.
- (37) Consequently, in its analysis concerning a refusal to supply by a dominant undertaking, the Board will take into account the short and long term effects of an obligation to supply together.
- (38) An undertaking's refusal to supply the goods or services it produces as well as tangible or intangible business inputs in its possession to other undertakings, or its direct or indirect refusal to allow other undertakings to use thereof are considered instances of refusal to supply. Within this framework, physical products in the nature of raw materials, infrastructure necessary for the provision of certain services, product distribution systems

and intangible business inputs or information protected or unprotected by intellectual property rights as well as other assets which undertakings may demand can be counted among the goods, services or inputs mentioned above.

- (39) Refusal to supply can take the form of halting an ongoing supply relationship concerning the goods, services or inputs, or it can be in the form of refusing the demands of potential customers for supply.
- (40) Refusal to supply may occur as unconditional or conditional refusal to supply. If the dominant undertaking refuses to supply without attaching any conditions, this is considered unconditional refusal. On the other hand, if it imposes certain conditions on the undertaking requesting the supply, such as not competing with the dominant undertaking in the downstream market or not dealing with an undertaking competing with the dominant undertaking, this is considered conditional refusal. Conduct under the scope of conditional refusal is generally an instrument for other competition infringements such as tying and exclusivity, and are therefore examined within the framework of those infringements. This section of the Guidelines will only deal with unconditional refusals.
- (41) Refusal to supply can be in the form direct refusal through the dominant undertaking refusing the request for supply without citing a reason, or in the form of "constructive refusal" through behavior including undue delays, restriction of product supply and imposition of unreasonable conditions.
- (42) As well, the practice of refusal to supply may be aimed at those undertakings which are rivals to the dominant undertaking in the downstream market, or at those customers are not in competition with it. In this instance, the concept of "downstream market" refers to the market for which the input demanded is needed for manufacturing a product or providing a service. In case the dominant undertaking is in competition with the undertaking it refused to supply in the downstream market, then the refusal to supply practice is more likely to lead restrictive effect on competition.
- (43) When assessing claims of refusal to supply, Board looks for the presence of all of the following three conditions in order to find a violation.<sup>9</sup> Within this framework,
- the refusal should relate to a product or service that is indispensable to be able to compete in a downstream market,
  - the refusal should be likely to lead to the elimination of effective competition in the downstream market,

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<sup>9</sup> See the Board's Digiturk decision numbered 12-24/710-198.

- the refusal should be likely to lead to consumer harm.
- (44) When evaluating the indispensability condition, the Board tries to determine if the refused input is objectively necessary in order to compete effectively in the downstream market. This is the case where there is no actual or potential substitute for the refused input on which competitors in the downstream market could rely so as to counter – at least in the long term – the negative effects of the refusal. When assessing whether there are actual or potential substitutes for the relevant input, the Board considers whether the competitors of the dominant undertaking could effectively duplicate the input in question in the foreseeable future. In general, if the relevant input is the result of a natural monopoly, if there are significant network effects, or in case of information that can be acquired from a single source, it is generally concluded that the input in question is impossible for the competitors to duplicate. Nonetheless, the Board takes the dynamic structure of the market and the sustainability of the market power provided by the relevant input into account separately for each file.
- (45) The criteria listed in paragraph 43 apply both to cases of disruption of previous supply relationship and to refusals by the dominant undertaking to supply a good, service or input which has not previously provided. However, an infringement is more likely in case of the disruption of a current supply arrangement. For instance, specific to the supply relationship established with the dominant undertaking, the customer may have made an investment to use the input it would procure under the arrangement concerned. This would be taken into account as an important factor in identifying the relevant input as indispensable. Also, the fact that the dominant undertaking previously supplied the input in question may be considered an indication that supplying the product does not constitute a risk that the undertaking would be unable to receive sufficient compensation for its initial investment.
- (46) Where it is established that the refused input fulfills the indispensability condition, the Board evaluates whether a refusal to supply by the dominant undertaking is likely to eliminate effective competition in the downstream market immediately or over time. The larger the share of the dominant undertaking in the downstream market, the greater the likelihood of elimination of effective competition in the downstream market will be. In addition, if the dominant undertaking has less capacity-constraints relative to competitors in the downstream market and if the goods or services it produces are close substitutes for those of its competitors in the downstream market, the likelihood for elimination of competition in the downstream market will increase. This is due to the fact that, in this case, the proportion of competitors affected by the refusal to supply will increase, as will



the level of demand that will shift from the foreclosed competitors to the dominant undertaking.

- (47) In examining the likelihood of a refusal to supply to lead to consumer harm, it is examined whether, for consumers, the negative consequences of the refusal to supply in the relevant market outweigh the negative consequences to be created over time by imposing an obligation to supply. For instance, consumer harm may be likely where, as a result of the dominant undertaking's refusal to supply, competitors are prevented from bringing innovative goods or services to market and/or where the refusal behavior stifles follow-on innovation. This may be particularly the case where the competitor which requests supply does not intend to limit itself to the goods or services already offered by the dominant undertaking, but aims to produce new or improved goods or services for which there is potential demand or where the competitor is likely to contribute to technical development. Similarly, in assessing consumer harm, it is also taken into consideration whether a refusal to supply would allow the dominant undertaking to gain more profits in the downstream market than it would normally do.
- (48) In addition to the co-existence of the three conditions listed above, the Board will also consider claims of justification put forward by the undertaking. Issues which may be considered objective necessity include those cases where the undertaking requesting supply lacks commercial credibility, where the supply is temporarily or permanently halted due to capacity constraints, or where certain safety requirements could not be met.
- (49) On the other hand, the claim that the dominant undertaking would not realize adequate returns sufficient to compensate its investment in case it agreed to supply, that the dominant undertaking would need to exploit the input refused for a certain period of time in order to continue its investments or otherwise the incentives to invest would be negatively affected can be evaluated within the context of the efficiency defense.

## **5.2. Predatory Pricing**

- (50) Predatory pricing is an anti-competitive pricing strategy whereby a dominant undertaking, with a view to maintain or strengthen its market power, accepts incurring losses (sacrifices profits) by setting a below-cost sales price in the short-term, in order to foreclose or discipline one or more of its actual or potential competitors, or otherwise prevent their competitive behavior. In predatory pricing, even though consumers enjoy low prices in the short-term, competition constraints can lead to undesired consequences in the mid- and long-term, such as high prices, low quality and a decrease in consumer choice.

- (51) In predatory pricing analysis, which compares the price implemented by the dominant undertaking with the costs incurred with respect to the conduct under examination, the Board evaluates whether the conduct in question is likely to lead to market foreclosure for an equally efficient competitor.<sup>10</sup>
- (52) The first phase of the predatory pricing analysis of the Board is the assessment of whether the dominant undertaking sacrificed in the short-term with its pricing practice. If, by charging a lower price for all or a particular part of its output over the relevant time period, the dominant undertaking incurred or is incurring losses that could have been avoided, this will be considered a sacrifice. Accordingly, the criterion of average avoidable cost (AAC)<sup>11</sup> may be used in determining whether a dominant undertaking incurred avoidable losses as a result of its conduct under examination.
- (53) If the dominant undertaking sets a price below AAC for all or part of its output, it is incurring a loss that could be avoided by not producing that output. Therefore, failing to meet AAC indicates that the dominant undertaking sacrificing in the short-term and suggests that an equally efficient competitor would be unable to serve the targeted customers without incurring losses.
- (54) Another cost criterion that can be used by the Board in predatory pricing assessment under certain exceptional circumstances in light of the conditions of the relevant market is the long-run average incremental cost (LRAIC).<sup>12</sup> LRAIC is generally higher than AAC because unlike AAC (which only includes fixed costs incurred within the examined period), LRAIC also includes fixed costs related to the product under examination, incurred in the period before the asserted abusive conduct. Where LRAIC is used as the relevant cost

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<sup>10</sup> For exceptions see paragraph 29.

<sup>11</sup> AAC may be defined as the costs an undertaking would avoid or save if had not produced a discrete amount of output. When calculating AAC, the sum of all variable and fixed costs directly related to production can be taken into account in order to calculate all costs incurred by the business for the production under examination. Since it is only possible to avoid variable costs in the short-term, in most cases AAC and average variable cost (AVC) will be the same. However, in cases where the dominant undertaking must make additional investment in capacity in order to implement the conduct under examination, the fixed costs in question are also taken into account in cost calculation. In such cases AAC is a more suitable criterion than AVC.

<sup>12</sup> LRAIC, on the other hand, is the average of all (fixed and variable) costs a firm incurs to manufacture a product. Average total cost (ATC) and LRAIC are good proxies for each other. In fact, these two types of costs are the same for single product firms. On the other hand, for multi-product firms, LRAIC may be below ATC for each individual product, where economies of scope are a factor. In the case of multiple products, any costs that could have been avoided by not producing a particular product cannot be considered common costs. However, in situations where common costs are significant, such costs may also be taken into account in the assessment concerning the exclusion of an equally efficient company. It may be said that LRAIC is a more suitable criterion for those markets with very low variable costs and very high fixed costs, such as network industries, technology markets and markets that require high R&D investments.

criterion, failing to meet LRAIC shows that the dominant undertaking did not recoup all costs concerning the production of the good or service in question and an equally efficient competitor can be foreclosed. Where the price is above LRAIC, the conduct of the dominant undertaking will not be considered predatory pricing, since equally efficient competitors will be able to continue their operations without incurring losses.

- (55) In assessing the existence of sacrifice in the dominant undertaking's conduct, it may be possible to rely upon direct evidence such as a detailed plan belonging to the undertaking in question to sacrifice, which aims to exclude a competitor, to prevent entry or to pre-empt the emergence of a market.
- (56) In predatory pricing analysis, when evaluating whether the pricing practice of the dominant undertaking is likely to lead to anti-competitive foreclosure, factors other than those listed in paragraph 26 may be examined, in addition to the establishment of short-term sacrifice. For instance, if the dominant undertaking is better informed about cost or other market conditions, it may engage in predatory conduct so as to influence the expectations of potential entrants and thereby deter entry. If the targeted competitor is dependent on external financing, substantial price decreases or other predatory conduct by the dominant undertaking could adversely affect the competitor's performance so that its access to further financing may be undermined. In addition, if the conduct and likely effects are felt on multiple markets and/or when there are various attempts at entry, the dominant undertaking may be said to be seeking a reputation for predatory conduct within the market.
- (57) It is necessary for competitors to have actually exited the market for the Board to conclude that there has been anti-competitive foreclosure through predatory pricing. The possibility should not be excluded that the dominant undertaking may prefer to prevent the competitor from competing efficiently and instead have it follow the dominant undertaking's pricing, rather than eliminate it from the market altogether. Such disciplining conduct avoids the risk of driving competitors out of the market, in particular the risk that the assets of the competitor are sold at a low price, allowing a new entrant into the market with low costs.
- (58) Generally speaking, if the dominant undertaking is expected have greater market power after it concludes its predatory conduct than it did before the conduct in question, then the undertaking is considered to be in a position to benefit from the sacrifice and thus consumer harm is likely. However, this does not mean that the Board will only intervene if the dominant undertaking gains the ability to increase its prices above the level persisting before the conduct. For instance, it is sufficient for the identification of consumer harm that the conduct would be likely to prevent or delay a decline in prices that would otherwise have occurred.

- (59) Since selectively targeting only certain customers for below-cost prices would limit the losses incurred by the dominant undertaking, it may be easier for it to engage in predatory conduct in this way.
- (60) In general it is considered unlikely that predatory conduct will create efficiencies. However, provided that the conditions set out in Section 4 are fulfilled, the Board will consider claims by a dominant undertaking that the low pricing enables it to achieve economies of scale and ensure efficiencies related to expanding the market.

### 5.3. Price/Margin Squeeze

- (61) Price squeeze occurs when an undertaking active in vertically related markets that is dominant in the upstream market sets the margin between the prices of the upstream and downstream products at a level which does not allow even an equally efficient competitor in the downstream market to trade profitably on a lasting basis.<sup>13</sup> The undertaking dominant in the upstream may cause margin squeeze by increasing the price for the upstream product, by decreasing the price for the downstream product, or by doing both simultaneously. Thus, the dominant undertaking is able to transfer its market power over the upstream product to the downstream market and lead to the restriction of competition.
- (62) In determining the likelihood of the conduct under examination leading to anti-competitive foreclosure by price squeeze, the Board takes the following factors into account, in addition to those listed in paragraph 26:
- *Structure of the undertaking*: The undertaking must be active in upstream and downstream markets that are connected to each other in a production chain; i.e., it must have an integrated structure and form a single economic entity.
  - *Nature of the product*: The upstream product must be indispensable for operating in the downstream market.<sup>14</sup>
  - *Position of the undertaking in the relevant market(s)*: The undertaking must hold dominant position in the upstream market. On the other hand, even though the Board does not look for dominance in the downstream market, this may be taken into consideration as a factor that compounds the restrictive effects of the price squeezing behavior on competition.
  - *Margin between prices*: The margin between the upstream and downstream products must be so low as to ensure that a competitor that is as efficient as the undertaking dominant in the upstream market would be unable to profit and operate in the downstream market on a

<sup>13</sup> See the Board's TTNET price squeeze decision numbered 08-65/1055-411.

<sup>14</sup> For indispensability criterion see para. 46.

lasting basis. When establishing the costs of the equally efficient competitor, the Board will generally use LRAIC, calculated for the downstream product of an undertaking dominant in the upstream market.<sup>15</sup>

- (63) The Board considers justification claims put forward by the vertically integrated undertaking concerning the price squeeze. Within this context, in particular, claims that the asserted strategy is caused by market conditions, that the margins shrunk due to changes in the upstream supply and downstream demand, and/or that the lower-priced product is newly-launched may be taken into consideration as justifications.

#### **5.4. Exclusivity/Single Branding Agreements**

- (64) Exclusivity agreements are agreements which place a buyer under an obligation to purchase the entirety or a significant portion of its demand for a product or group of products only from a single supplier.<sup>16</sup> These agreements may be examined under article 6 of the Act if the supplier holds a dominant position.<sup>17</sup> In this context, a written agreement between the dominant undertaking and the buyer including an exclusivity provision is not necessary; oral agreements and/or dominant undertaking practices which may lead to de facto<sup>18</sup> exclusivity (such as various obligations placed on the buyer or indirect provisions in agreements) are also evaluated within this framework.
- (65) Agreements with exclusive provisions may have positive effects on competition. The first of these pro-competitive effects is the elimination of the free-riding problem. For instance, any inclination of a supplier to provide training for the personnel of its distributor in order to increase its sales and/or make its distribution chain more efficient may be eliminated if it is likely that its competitor might take unfair advantage of that training (free-riding problem). However, if the distributor were to sell the products of the supplier exclusively, this problem would disappear. Another positive effect of exclusivity is that it ensures a regular product flow for the buying undertaking while providing a steady sales channel for the supplier. As well, exclusivity agreements increase the likelihood of the supplier making

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<sup>15</sup> When calculating the aforementioned LRAIC, it is assumed that that undertaking dominant in the upstream market uses its upstream product at the same price it sells that product to its competitors downstream.

<sup>16</sup> As the definition implies, exclusivity agreements are concluded between undertakings operating at different levels of the production chain (production, input supply, wholesales, distribution, retail sales, etc.). The commercial relationship with the end-user/consumer is not addressed within this framework. In addition, exclusivity agreements also include agreements a buyer holding dominant position signs with an input supplier, which places that input supplier under an obligation to make the entirety or a significant portion of its sales to the dominant undertaking.

<sup>17</sup> Exclusivity agreements may be addressed under the scope of article 4 of the Act.

<sup>18</sup> See the Board's Turkcell decision numbered 11-34/742-230.

investments specific to the trade relationship. This is because exclusivity contributes to the return of investment process for the supplier as well as to the elimination of the hold-up problem,<sup>19</sup> especially as its duration extends.<sup>20</sup> In addition, exclusivity agreements may contribute to the competitive process and consumer welfare by focusing the buyer on a single product/brand and allowing it to make more effective promotions, by establishing a more robust inter-brand competition environment, and thus by ensuring an increase in product and service quality.

- (66) On the other hand exclusivity agreements signed by a dominant undertaking also have restricting effect on competition. By preventing the access of (actual and potential) competitors to necessary channels, exclusivity agreements foreclose relevant market(s) and thus may restrict the likelihood that other firms might emerge as an efficient competitor for the dominant undertaking.
- (67) Even though factors listed in paragraph 26, such as the positions of the dominant undertaking and its competitors and the duration of the conduct examined,<sup>21</sup> are important in identifying (potential) anti-competitive foreclosure effects stemming from exclusive agreements, other factors considered during the assessment are as follows:
- *The scope of the conduct under examination:* Foreclosure effects of exclusive agreements increase as the exclusive portion of the dominant undertaking's sales within the total sales in the market, i.e. tied market share, increases. In particular, anti-competitive effects increase if tied market share is sufficiently high to prevent a competing firm from operating efficiently by taking advantage of economies of scale. However, if the dominant undertaking implements exclusivity only for important (in that they are financially strong or their place of business is critical in terms of location) buyers (that is to say, in case it selects important buyers), anti-competitive foreclosure effects may still arise even in the absence of significant tied market share.
  - *The level of trade:* A dominant undertaking introducing exclusivity arrangements for a buyer at the retail level may lead to more anti-competitive foreclosure effects in comparison to the situation where the buyer is at the wholesale level. In other words, the closer the level of trade with exclusivity to the end-user, the more likely it will be for the relevant market to be foreclosed to actual or potential competitors.

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<sup>19</sup> For detailed information on the hold-up problem, see the Guidelines on Vertical Agreements, p.32.

<sup>20</sup> For an example to the Board decisions assessing investments specific to the trade relationship, see the Karbogaz decision numbered 05-80/1106-317.

<sup>21</sup> See the Board's Karbogaz decision numbered 05-80/1106-317 and Frito Lay decision numbered 06-24/304-71.

- *Barriers to entry*: The harder it is for rival suppliers to access alternative buyers and/or create new buyer channels, the more severe will be the foreclosure effect of the dominant undertaking's exclusive arrangements in the market. Barriers to entry also gain importance for the assessment since they make it more difficult for potential competitors to emerge as efficient competitors.
  - *The importance of the dominant undertaking for customers and the duration of exclusivity*: If the dominant undertaking and its rivals can compete for the entirety of each consumer's demand under equal conditions, it is not considered likely for exclusive purchase provisions to have negative effects on competition. However, in such cases, a long duration of exclusivity may negatively affect competition by making it harder for customers to switch suppliers. On the other hand, if the dominant undertaking is an unavoidable trading partner for a significant part of the customers' demand,<sup>22</sup> even a short-term exclusivity provision may lead to anti-competitive foreclosure.
- (68) Claims of justification put forward by the dominant undertaking in regard to exclusivity agreements are considered by the Board in its assessments. Within the framework of exclusivity, the presence of relationship-specific investments, the reductive effect of exclusive arrangements on costs or their positive contribution to innovation, etc. may be taken into consideration as claims of justification.

### **5.5. Rebate Systems**

- (69) Rebate systems refer to the discounts in price offered to customers in return for them engaging in a certain purchasing behavior. Under the dynamic conditions of commercial life, rebate systems can be encountered in many different forms and they may vary depending on their structure, function and effect.
- (70) The most fundamental distinction in the classification of rebate systems is between single-product rebates and package rebates. If, in a rebate system, discounts are tied to the purchase of a single product, such rebates are considered to be "single-product rebates". However, if the purchasing obligation of the rebate system covers more than one product or market, then the rebates in question are referred to as "package rebates".<sup>23</sup> Rebate systems are also classified into retroactive rebates and top-slice rebates, depending on the scope of

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<sup>22</sup> In case a customer is obligated to make a portion of its purchases from the dominant undertaking under any circumstances, then the dominant undertaking is considered an unavoidable trading partner for the customer in question.

<sup>23</sup> In package rebates known as multi-product rebate or mixed packaging, the products may be offered for sale separately, however when they are bought separately the total price of the products adds up to more than the package price. Rebates which are offered depending on the customer purchasing at least two distinct products or purchasing a certain amount from the market in a certain time period are also considered package rebates.

the discount. Rebate systems in which the customer can get discounts for all of its purchases from the undertaking offering the rebate within the relevant period if it hits the rebate target are called "retroactive rebates," while rebate systems in which the customer can only get discounts for its purchases over the rebate target are called "top-slice rebates".

- (71) Rebate systems may include standard purchase target(s) applicable to all customers, or they may include purchase targets individualized depending on the demand of each customer.<sup>24</sup> If a purchase target applicable to all customers serves the same function as an individualized purchase target for a certain group of customers, the target in question is considered to be individualized for those customers.
- (72) Rebate systems, which see common use in commercial life, can have effects that can increase efficiency and consumer welfare, such as ensuring price drops, increasing level of output and product variety, reducing transaction costs stemming from the separate sale of products, and preventing free-riding by ensuring that resellers focus on the products of the supplier. On the other hand, when offered by dominant undertakings, the rebates in question may also lead to anti-competitive foreclosure.
- (73) When assessing whether a rebate system implemented by a dominant undertaking is likely to cause anti-competitive foreclosure, the Board will consider the following factors, in addition to those listed in paragraph 26.

#### *Single-Product Rebates*

- (74) The typical characteristic of single-product rebates is that the purchase condition included in the rebate system must be fulfilled within a certain period (reference period). In such rebates, no discount is awarded if the purchase condition required for the rebate is not fulfilled within the relevant reference period. Whereas, in rebate systems which do not limit the purchase condition to a certain period, buyers do not face the risk of losing the discount due to the expiry of the reference period. Therefore, buyers can always switch to rival suppliers offering more attractive deals than the dominant undertaking, so long as the system does not turn into predatory pricing. Within this framework, the Board will examine those rebate systems which include a certain purchase condition but do not limit the fulfillment of that condition to a certain reference period in light of the above clarifications on predatory pricing.

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<sup>24</sup> Individualized purchase targets may be formulized in various ways. For instance, such a purchase target may be a quantity target identified depending on the total demand of the customer in a certain period, or it may be identified as a portion of the purchases the customer will make in a certain period or as a portion of the purchases the customer made in a reference period in the past.



- (75) It is more likely for retroactive rebates to cause anti-competitive foreclosure where rebate targets are individualized, where the rebate percentage and rebate target constitute a significant part of the total demand of the consumer within the relevant reference period, and particularly where the competitors of the dominant undertaking are unable to compete with it under equal conditions for the entirety of each customer's demand
- (76) If any customer must meet a part of its demand in the reference period from the dominant undertaking in any case, then the competitors will not be able to compete with the dominant undertaking under equal conditions for the entirety of the demand of the customer in question. By offering a retroactive rebate to such a customer, a dominant undertaking can prevent equally efficient competitors from selling to the said customer without dropping its prices below its costs.<sup>25</sup> The basis of the Board's assessment concerning retroactive rebates is the examination of whether, in response to the rebate, equally efficient competitors would be able to effectively compete with the dominant undertaking for the contestable portion of the customer's demand.
- (77) Within this framework, if it is established that, in response to a retroactive rebate offered by the dominant undertaking, the price competitors would have to offer in order to attract the contestable portion of the customers (effective price) is above LRAIC, it will be concluded that, for the customers in question, equally efficient competitors will be able to effectively compete with the dominant undertaking. However, in case it is established that the effective price is below AAC, then the conclusion is that the rebate system implemented excludes equally efficient competitors from competing for the customers in question. In case the effective price is established to be between AAC and LRAIC, the Board examines whether the rebate system has negative effects on the entry or expansion of equally efficient competitors. In this context, the Board examines whether competitors have realistic and effective counter-strategies to counter the rebate system implemented. For instance, strategies which allow the competitors to counter the discounts of the dominant undertaking without resorting to below-cost pricing, by utilizing the non-contestable portion of their

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<sup>25</sup> That is to say, even if, in response to the rebate implementation of the dominant undertaking, competing undertakings were to offer the customer, who must fulfill the non-contestable portion of its demand in the relevant period from the dominant undertaking in any case, rebates for the contestable portion of its demand equal to the discounted prices of the dominant undertaking, the customer would continue to purchase from the dominant undertaking in order not to lose the rebates for its purchases, at least until it hits its rebate target. In this case, in order to convince the customer to buy from them, competing undertakings would, within a relatively limited sales volume, need to offer a price that would meet the dominant undertaking's rebate for the relevant units and that would, at the same time, compensate the amount of rebates the customer would lose due to buying from them instead of the dominant undertaking. Consequently, to be able to sell to a customer in a retroactive rebate system, competing undertakings must offer a price that is sufficiently below the discounted price of the dominant undertaking.

own customers' demand may be considered within this framework. If the Board finds that competing undertakings are unable to put such a counter-strategy into effect, it concludes that the rebate system under examination excludes equally efficient competitors.

- (78) It is possible to address top-slice rebates as a pricing strategy where low prices are implemented only for a portion of the sales. In examining such discounts, the Board looks at whether equally efficient competitors are excluded from competition for the units above the rebate target. This examination is conducted based on the price-cost analysis given in paragraph 77.

#### *Package rebates*

- (79) The Board's assessments concerning the restrictive effects of package rebates on competition may vary depending on the package offered by the dominant undertaking, and on whether competitors can (either alone or together with other competitors) compete by offering a reasonable alternative package. Restrictive effects on competition which are likely to emerge where competition between packages is possible would be similar to predatory pricing.
- (80) Where the rebate implemented for the whole package is attributed to any individual product within the package, if the effective price for the product in question<sup>26</sup> is lower than LRAIC for the same product, it is concluded that equally efficient competitors are excluded from competition by the rebate implementation.
- (81) When assessing rebate systems, the Board considers justification claims put forward by undertakings, such as increasing output level and product variety, reducing transaction costs stemming from buying the products separately, and preventing free-riding by ensuring that reseller are focused on the products of the supplier.

### **5.6. Tying**

- (82) Tying usually refers to situations where customers that purchase one product (the tying product) from the dominant undertaking are required also to purchase another product (the tied product) from the same undertaking as well. Tying can be implemented by integrating what may be recognized as two separate products (technical tying) or through contracts (contractual tying).

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<sup>26</sup> In package sales, effective price for the relevant product is calculated by subtracting the rebate offered for the whole package from the individual sale price of the product concerned.

- (83) In most cases tying is a common commercial practice with no restrictive effects on competition. Both dominant undertakings and others may engage in tying in order to present better products to their customers or to offer less costly choices.
- (84) On other hand, a dominant undertaking can harm consumers by causing foreclosure in the tied market. This is because through tying, the dominant undertaking can drive existing competitors from the market by reducing the number of potential customers and create new barriers to entry for its competitors in the tied market.
- (85) Foreclosing the tied market would allow the dominant undertaking to make higher profits from that market, and it would also strengthen or maintain its dominant position in the tying market.
- (86) When assessing whether the practice of an undertaking with dominant position in the tying market is in violation of the Act, the Board looks for the presence of two factors:
- the tying product and the tied product should be distinct,
  - it should be likely for the tying practice to lead to anti-competitive foreclosure.
- (87) If, in the absence of the tying practice, a significant portion of the customers would purchase or would have purchased the tying product without purchasing the tied product, the Board considers these products to be distinct. When determining whether the tied and tying products are distinct, the Board may use direct evidence showing that customers buy the products separately when given a choice, or it may use indirect evidence such as the presence of undertakings in the market which are specialized in the production or sales of the tied product without the tying product.
- (88) As stated above, tying may lead to anti-competitive foreclosure in the tying market, in the tied market, or both. When determining the likelihood of a tying practice implemented by the dominant undertaking to lead to anti-competitive foreclosure, the Board will take the following factors into consideration in addition to those listed in article 26.
- (89) The risk of anti-competitive foreclosure stemming from the conduct is greater where the dominant firm makes the strategy in question a lasting one. Technical tying, which is costly to reverse, may be given as an example to this.
- (90) In some tying cases the undertaking may have dominant position in more than one product. As the number of such products subject to tying increases the likelihood of anti-competitive foreclosure increases as well.
- (91) Where the production of the tied product benefits from economies of scale, it may become likely for competitors in the tied product market to lose customers which purchase the tying

product and fail to achieve sufficient sales to realize economies of scale. This, in turn, would indicate that anti-competitive foreclosure is more likely, for the purposes of the assessment of the Board.

- (92) If the prices the dominant undertaking can charge in the tying market are regulated, tying may allow the dominant undertaking to raise prices in the tied market in order to compensate for the loss of revenue caused by the regulation in the tying market.
- (93) If the tied product is an important complementary product for customers of the tying product, a reduction of alternative suppliers of the tied product and hence a reduced availability of that product can make entry to the tying market alone more difficult.
- (94) The Board may consider and include in its analysis arguments of the dominant undertaking engaging in the tying conduct, which claim that the practice ensures production and distribution savings to the benefit of customers, that it reduces transaction costs for customers who otherwise would have to buy the bundled products separately, and that it allows the supplier to pass on to the consumers any efficiencies stemming from the production or purchase of the tied products in large numbers.